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REPORTS OF CASES

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ADJUDGED IN THE

COURT OF APPEALS

OF THE

DISTRICT OF COLUMBIA

From MARCH 6, 1901, to NOVEMBER 6, 1901.

Published by Authority of the Court.

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OF

THE COURT OF APPEALS

OF THE

DISTRICT OF COLUMBIA

DURING THE TIME OF THESE REPORTS.

Chief Justice:

HON. RICHARD H. ALVEY.

Associate Justices:

HON. MARTIN F. MORRIS,
HON. SETH SHEPARD.

U. S. District Attorney:

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Reporter:

CHARLES COWLES TUCKER.

* Resigned April 23, 1901.

† Appointed April 23, 1901.

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LINDEMEYR *v.* HOFFMAN.

PATENTS; REDUCTION TO PRACTICE.

1. No actual test of the practicability of a device is needed to constitute reduction to practice, where the device is itself complete and capable of practical use; but where the device made was crude and the inventor himself testifies that he did not regard it as fit for practical use, it cannot be regarded as reduction to practice of the invention, although others made subsequently upon the same pattern were practical and successful.
2. Where, in an interference case, there is no satisfactory proof of actual reduction to practice by either party before the filing of their applications, the one who was first to conceive the invention and the first, by three days, to file his application, and so constructively reduce to practice, is entitled to an award of priority of invention.

No. 156. Patent Appeals. Submitted January 11, 1901. Decided March 6, 1901.

HEARING on an appeal from a decision of the Commissioner of Patents, in an interference case. *Affirmed.*

The facts are sufficiently stated in the opinion.

Mr. B. R. Catlin and Mr. Philip Mauro for the appellant.

Messrs. Pennie & Goldsborough for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

This is an appeal from the decision of the acting Commissioner of Patents in an interference case wherein the subject-matter of controversy is described to be — a sheet-metal cap for closing bottles and the like, having in its sides plain faces indented to form inwardly extending lugs and longitudinally crimped between said faces to afford a good holding-surface.

The appellees, Edmund Hoffman and Robert Portes Frist, hold a patent for this invention, for which they made application on March 29, 1898, and which was issued to them on November 1, 1898. The appellant, Philip Lindemeyr, filed his application on March 13, 1899. He was, therefore, the junior applicant and required also to overcome the effect of a previously existing patent. The burden thus imposed upon him it is sought on his behalf to lessen by reference to the fact that his present application is no more than a proper division of a previous application filed by him on April 1, 1898, wherein the matter here in controversy is embodied and distinctly shown, but not specifically claimed, and which application, after having been permitted to lapse in consequence of failure to pay the final fee required by the Patent Office, was duly renewed, and allowed to go to patent on March 14, 1899, one day after the filing of the application in the present case. Upon the theory, therefore, that the present application is no more than a division of the previous one, made while that previous application was pending and before it had gone to patent, a proceeding authorized by the rules and practice of the Patent Office, it is claimed that the applications of both parties for the invention now in controversy were both pending at the same time. But even upon this theory, the appellant Lindemeyr remains the junior applicant, his first application being three days later than that

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of his opponent's, and the burden of proof in any event is upon him. The facts which have been stated are important only in the determination of the amount and character of the proof required from him in order to enable him to prevail over his opponents.

In his preliminary statement Lindemeyr alleged that he had conceived, disclosed; and reduced the invention to practice in May of 1896, and that a few caps had been made and put in use. The preliminary statement of Hoffman and Frist, alleged conception by them in 1891, disclosure in 1894, construction of machinery to manufacture the article in August or September of 1897, and the actual manufacture of the article by September 15, 1897; and that manufactured product was put upon the market on May 11, 1898.

When, after testimony taken, the cause came on for determination, the examiner of interferences held that Lindemeyr, although his proof was somewhat weak, had established his conception and reduction to practice in May of 1896, according to the claim of his preliminary statement; that the alleged conception of the invention by Hoffman and Frist in 1891, being shown by no other testimony than their own, could not be admitted; that they did, however, sufficiently prove that they had a conception of it in 1894; that what they did then was not a reduction to practice; and that their first reduction to practice was only the constructive reduction evidenced by the filing of their application on March 29, 1898. The examiner thereupon held that Hoffman and Frist were the first to conceive the invention and the last to reduce it to practice; and that their priority of conception could not avail them as against one who had in the meantime entered the field, conceived the invention, and reduced it to practice, unless they were then in the exercise of due diligence. He found that they were not in the exercise of due diligence, and that they had done nothing in the matter from 1894 to 1897. He, therefore, awarded judgment of priority of invention to Lindemeyr. Incidentally, also, he ruled that Lindemeyr was required to prove his case only by a preponderance of evidence; and also that his patent

issued on March 14, 1899, was no bar to the present application, either on the ground that the present application, if allowed, would result in a duplication of patents, or on the other ground that the invention being shown in the previous patent and in the application therefor, the failure to claim it should be regarded as an abandonment of it to the public.

The board of examiners-in-chief found that, while Lindemeyr had a conception of the invention in 1896, there was no reduction to practice by him before the constructive reduction involved in the filing of his application on April 1, 1898. And they found conception by Hoffman and Frist in 1894, and constructive reduction to practice by them in their application filed on March 29, 1898. They were, therefore, held to be the first to conceive and the first to reduce to practice, and consequently to be entitled to a judgment of priority of invention, which was awarded to them, and the decision of the examiner of interferences was reversed. The board of examiners did not deem it necessary to pass upon the question of actual reduction to practice by Hoffman and Frist before the filing of their application, and they left that matter in doubt.

Upon appeal to the Commissioner of Patents, the acting Commissioner, who sat in his place, held that there was sufficient proof of reduction to practice by Hoffman and Frist in 1894; and consequently that they antedated Lindemeyr in every respect. He, therefore, affirmed the decision of the board of examiners in awarding priority of invention to Hoffman and Frist.

From the decision of the acting Commissioner of Patents the cause now comes here on appeal.

While the Commissioner of Patents and the board of examiners-in-chief concur in the award of priority of invention to the appellees, Hoffman and Frist, thereby reversing the judgment of the examiner of interferences, which, as stated, was in favor of Lindemeyr, it is apparent that no two of the tribunals of the office are in accord as to the grounds of adjudication. There is one thing, however, in which they all agree; and that is, in the award of priority

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of conception of the invention to the appellees, not as of the year 1891, at which time they claim to have conceived it, and as to which there is no proof outside of their own unaided testimony, but as of the year 1894, when they claim to have made disclosure and a sketch of it, and possibly some attempt to reduce it to practice. This priority of conception is conceded on behalf of Lindemeyr. At all events, it is not controverted; and it may be assumed to have been satisfactorily established by the testimony. This conception antedates that of Lindemeyr by two years.

The point of controversy, therefore, is that of reduction to practice.

The appellees claim an actual reduction to practice by them in 1894; the appellant, a similar reduction to practice in 1896; and both were more or less active in the general subject-matter, to which the issue of the interference belongs, during the years 1897 and 1898. If it were satisfactorily shown by the testimony that there was actual reduction to practice by the appellees in 1894, as the assistant Commissioner of Patents found to be the fact, this, of course, would be decisive of the case.

If it were not so shown, then it would be proper to examine what was done by Lindemeyr in 1896; for it does not appear that anything was done in the meantime by either party.

We fully concur with the assistant Commissioner in his holding that no actual test of the practicability of a device is needed, where the device is itself complete and capable of practical use. Such was the holding of this court in the case of *Mason v. Hepburn*, 13 App. D. C. 86; and such has been the ruling in numerous other cases. And so, if the cap embodying the issue in this case, which was exhibited by the appellees in 1894, was a completed device and capable of practical use, although never actually used, it may undoubtedly be regarded as an actual reduction to practice of the invention in controversy. But we find ourselves unable to regard this cap as a completed device or capable of practical use; and to justify this conclusion we need not go farther than the tes-

timony of Hoffman himself, who, in cross-examination, in answer to a question whether he regarded this particular cap as fit for practical use on a bottle, said: "The design of it I do, but not the cap itself, as it is made in a very crude manner."

This is no more than to say that the idea would be found practical, when reduced to practice,—a mere truism; and it negatives all pretense of an actual reduction to practice. That caps were made afterward on the same pattern and after the same design, only shows that the idea was afterward embodied in practical results. But this does not help out the claim that the original crude device, conceded by the inventor not to be fit for practical use, was an actual reduction to practice. Such a claim must be regarded as a contradiction in terms, and wholly untenable.

As this cap of the appellees, claimed to have been designed in 1891 and exhibited in 1894, is the only evidence of actual reduction of the invention to practice by the appellees before 1897, we must hold that they fail to show such actual reduction to practice before the action, whatever it was, of the appellant in 1896.

And here it may be remarked as qualifying the testimony on both sides that the parties to this interference appear from the record not to be novices in the field of invention, that they have had numerous patents issued to them during the period of the incubation of this invention; and that, therefore, they must be supposed not to be ignorant of the requirements of the patent law, or ignorant of the requirements of the laws of evidence which govern cases like the present.

Lindemeyr, in support of his claim that he conceived and reduced to practice in 1896 the invention in controversy, has offered in evidence a cap which is designated in the record as "Exhibit Cap No. 1," which contains the issue of the interference, and which may be assumed from the testimony to have been made about May of 1896. This is the time at which he himself testifies that it was made; although, strangely enough, his only witnesses who testify definitely

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as to the time at which this exhibit was made, say, and one of them says very positively, that it was made before April 1, 1896. But we may assume it to have been made, when Lindemeyr himself says it was made, after and not before the date of his conception of the invention in May, 1896.

Lindemeyr further testifies that immediately thereafter he caused a brass neck to be fitted on a bottle, and that on this brass-necked bottle he used satisfactorily his cap No. 1; that thereafter he caused a wooden model bottle to be made, which was introduced in evidence as "Lindemeyr Exhibit A," from which a number of bottles were made about September of 1897; that in the summer of 1896 he had about fifty or seventy-five caps made like cap No. 1, which were subsequently fitted upon bottles; but that none of the caps, none of the bottles, were ever preserved; that there was no document of any kind to fix a date, and that nothing whatever was preserved which bore upon the alleged invention other than the original cap No. 1, and the wooden model "Exhibit A." There is no testimony of other witnesses sufficiently positive and distinct to support the appellant's statement. Their testimony is simply to the effect that they saw other caps like cap No. 1. But as there are caps Nos. 2 and 3, and other caps in the case, which are more or less like cap No. 1, and yet which do not embody the issue in controversy, this testimony amounts to nothing. Nor can we attach any great importance to the wooden model "Exhibit A," which is the model of a bottle, because it is not the matter in issue, and is accommodated, as it would seem, to other caps also as well as that designated as "Cap No. 1."

"Cap No. 1," therefore, would seem to be the only substantial evidence of reduction to practice by the appellant in 1896; and cap No. 1 is not, in our opinion, a reduction to practice. It is, at the utmost, nothing more than a crude model. As remarked by the board of examiners, it has a hole punched through its top, and, therefore, in itself could never have been considered as a practical cap. It is also deficient in other respects, which are mentioned by the

board, and need not be repeated here. Moreover, as in the case of the so-called "Cap of 1891" of the appellees, the inventor himself does not seem quite sure of its practicability. When he was asked on cross-examination whether this cap made an efficient stopper, his answer was quite evasive and unsatisfactory. It was that these caps "stoppered the bottles they were put on;" and he declined to say whether they did so effectively. Of course the identical "Cap No. 1" produced in evidence could not have done so.

The fact would seem to be that both parties were working at something else, some caps more or less different from that here in issue, and discarded for the time as merely experimental and unsatisfactory, all that they had done in the line of the present invention, until the 25th day of March, 1898, when the appellant, in company with some other persons, visited the factory in which the appellees were concerned in New Jersey, and when both parties became more or less cognizant of the operations of each other. It would seem that it was not till then that the abandoned experiments of both were revived, and a rush was made for the Patent Office. At all events, we agree with the board of examiners-in-chief in the Patent Office in finding no satisfactory proof of actual reduction to practice by either party before the filing of their applications in the office on March 29, 1898, and April 1, 1898, respectively.

But, as the appellees were the first to come into the Patent Office, although only three days before the appellant, and thereby the first to acquire constructive reduction to practice, and were confessedly the first to conceive the invention, they are entitled to the award of priority of invention, as found in their favor both by the board of examiners and by the assistant Commissioner.

The decision of the assistant Commissioner of Patents is, therefore, *affirmed*. *The clerk of the court will certify this opinion and the proceedings in the cause in this court to the Commissioner of Patents according to law.*

FAUL v. HULICK.

SURVIVORSHIP; PRESUMPTIONS; WILLS; BURDEN OF PROOF.

1. The common law (unlike the Roman law and the modern law of some countries and States derived or adopted therefrom), indulges no presumption of survivorship, whatever may have been the age, sex or physical condition of the respective persons who have lost their lives in a common disaster; but it requires evidence as the basis of its action.
2. Where a testatrix devises her estate to her son, and provides that if she shall become the survivor of her son, the estate shall go to a certain charitable institution, and she and her son perish in the same shipwreck, the death of the son in the lifetime of his mother is a condition precedent to the taking effect of the bequest over, and the burden of proving that fact is upon the legatee, who will not take under the will unless such burden be discharged.
3. As between the next of kin of the testatrix, in such a case, and the personal representatives of the son, as the will vests the estate in the son immediately upon the testatrix's death, the son's representatives have a *prima facie* right to take, and will do so in the absence of proof of the survivorship of the testatrix.

No. 1010. Submitted January, 18, 1901. Decided March 6, 1901.

HEARING on an appeal from a decree of the Supreme Court of the District of Columbia in a proceeding by way of interpleader to determine the rights of respective claimants of a fund belonging to the estate of a decedent. *Reversed.*

The COURT in its opinion stated the case as follows:

This case began with a bill of interpleader filed by the administrators, with the will annexed, of the estate of Sophia Rhodes, deceased. After the payment of all claims there remained in the hands of the administrators a fund of \$14,891.89 for distribution. Of this there were three sets

of claimants, namely, the Young Women's Christian Home, a corporation of the District created by act of Congress; the next of kin of said Sophia Rhodes; and the administrator of the estate of Eugene Rhodes, deceased.

The will of Sophia Rhodes, after providing for the payment of debts, etc., and for an income for her husband, Oliver Wheeler Rhodes, contained the following items:

"Item 2. I now give, devise and bequeath unto my only and beloved son, Eugene Rhodes, all my property, real, personal and mixed, of whatsoever nature, kind or description, including moneys, credits and evidences of indebtedness of which I may be possessed at the time of my death, to be his absolutely, to hold and to dispose of as unto him may seem good and proper, and subject only to the provisions of item 1 of this last will and testament.

"Item 3. In the event of the death of my son, Eugene Rhodes, before the decease either of myself or of my husband, I then give, devise and bequeath all my property, everything I own on earth, as follows, viz.:

"1st. I give, devise and bequeath all my pictures and paintings to the Young Women's Christian Home, in the city of Washington, District of Columbia. It is my will that the said pictures and paintings may, so long as the said home shall exist, be the ornaments of the said home, with my name as the giver connected with them during that time.

"2nd. All the rest and residue of my property, real, personal and mixed, I give, devise and bequeath to Michael H. Fitch, of Pueblo, Colorado, to have and to hold, in trust nevertheless, to invest the same to the best of his knowledge and experience, and to pay over the rents and profits arising therefrom to my husband, Oliver Wheeler Rhodes, during his, my said husband's life; and on the death of my said husband to turn over the said property, moneys, etc., with whatsoever accumulation thereon may be existing, to the Young Women's Christian Home, of Washington, in the District of Columbia, to be the property of the said home absolutely.

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"Item 4. In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I then, give, devise and bequeath all my property, real, personal and mixed, of whatsoever nature, kind or description, to the Young Women's Christian Home, of the city of Washington, in the District of Columbia, to have and to hold the same absolutely and forever, for the good of that institution. It is my will that my pictures and paintings shall be disposed of in this event as provided in paragraph 1st, of item 3, of this last will and testament.

"Lastly. I hereby constitute and appoint my only son, Eugene Rhodes, the sole executor and trustee of this my last will and testament; and it is my will that my said sole executor and trustee shall administer and execute this last will and testament without giving bond therefor."

The case was submitted on the hearing below upon an agreed statement of facts, from which it appears:

1. That Eugene Rhodes was the only child or descendant of Sophia Rhodes and Oliver W. Rhodes, and John L. French is the duly appointed administrator of his estate.

2. That the said Oliver Wheeler Rhodes departed this life in the District of Columbia on the 27th day of January, 1895; that his said wife and son were at that time in Heidelberg, Germany; that, being advised of his extreme illness, they started for Bremen to take the next steamer home, receiving a cablegram announcing his death a few hours before they sailed; that they sailed on the steamer "Elbe" at three o'clock P. M., on Tuesday, January 29, 1895, both occupying the same stateroom; that about 5:30 o'clock the next morning, as the ship was going in a southwesterly direction and was about due west of The Hague, she collided with the steamer "Craithie," en route northwesterly from Rotterdam to Scotland, the point of penetration being on the same side and deck of the "Elbe" and about eight feet abaft of the room occupied by the said testatrix and her son. In about twenty minutes thereafter the "Elbe" went down. One lifeboat, No. 3, got away with twenty-one survivors. Lifeboat

No. 5, filled mostly with women, capsized on being lowered to the water and all of its occupants were lost except one Anna Bocker, hereinafter referred to, who succeeded in getting into boat No. 3. Six weeks thereafter, March 6, 1895, the said Eugene's body came up in a fishing net off the coast of Holland; the mother's body was never recovered.

3. The testatrix was about fifty-two years of age at the time of her death, was corpulent of figure, and short-winded in breathing. Her son was about twenty-three years old, was rather a good swimmer, had never been married, and he died intestate.

4. The said Sophia Rhodes' next of kin, if she survived her said son, were and are her brother and sister, Andrew Waesner and Barbara Faul, defendants herein. If her said son survived her his next of kin were said Andrew Waesner and Barbara Faul, on his mother's side, and on his father's side John G. Rhodes, Melville D. Rhodes, and Mrs. Alice Fitch, brothers and sisters of his father. The said John G. Rhodes has since died, leaving a widow, Katherine Rhodes, of Georgetown, Ohio, and five children, viz., Mrs. Mary R. Story, of Cincinnati, Ohio; Mrs. Belle R. Latham, Burlington, Iowa; Miss Genevieve Rhodes, Cincinnati, Ohio; White Rhodes, Georgetown, Ohio, and John Rhodes, Nashville, Tennessee.

5. That of the twenty-one persons known to have survived shipwreck two only, Miss Anna Bocker and John Vevera, have any personal knowledge tending to show the respective movements and situation of the said Sophia Rhodes and Eugene Rhodes, her son, at the time of the disaster aforesaid and immediately preceding their death; and it is further agreed that said Anna Bocker, if produced as a witness on behalf of the defendant John L. French, would testify, and the following is to be taken as her deposition to the effect, that just after the collision she saw the testatrix come out of her cabin, clothed in a blanket over her night-dress, as if to see what the matter was, and that she, the witness, never saw the said Mrs. Rhodes afterward; that subsequently (certainly some minutes after) when she, Miss

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Bocker, went on deck she saw the said Eugene Rhodes just in front of her, and never saw him afterward; and that the said John Vevera, if produced as a witness in behalf of said Waesner and Faul, would testify, and the following is to be taken as his deposition to that effect, that he is a resident of the city of Cleveland, county of Cuyahoga, Ohio, residing at 339 Burton street; that he has lived in said city for twenty-six years last past; that from 1893 to 1896 he was a member of the board of county commissioners of Cuyahoga county, Ohio; that since the 1st day of January, 1896, he has been and now is in the real estate and insurance business in the city of Cleveland; that he was in Europe in the latter part of 1894 and took passage to return to this country on the steamship "Elbe;" that on the night preceding the disaster to this ship he sat at the same table with a mother and son; that his attention was attracted to them, as they seemed so happy and as the mother seemed so much interested in the boy, and that shortly thereafter he learned that the name of the woman was Mrs. Sophia Rhodes, and that the young man was her son; that after the accident which occurred on January 30, 1895, when every one was on the deck, he saw these parties on the left side of the boat. The mother had her arms thrown around the neck of her son in a grip that he thought she would never lose, and the son was endeavoring to put a shawl around her to protect her from the cold.

When affiant first came on the deck he went to the lifeboat on the right-hand side of the vessel, but found it filled with ladies, and no man was allowed to enter the boat, but after it left the vessel a short distance it was swamped. Affiant then fought his way over to the left-hand side, further to the rear; had to fight his way through a crowd of sailors who were keeping every one back. As he got to the side of the vessel a man was standing there with an ax. A friend of affiant's who immediately preceded him was struck down, but affiant succeeded in overcoming the man with the ax and jumped over the side of the vessel, and that he was the last one to get into the lifeboat, and was cut by the ax on his wrist.

The time he saw Mrs. Rhodes and her son last was just prior to his jumping over the side of the vessel. Affiant further states that it would have been impossible for them to have gotten through the sailors, who were keeping everybody back; that he was the last one to get into the lifeboat, and at the time he got in he was the nineteenth man in the boat. They endeavored to throw him out of the boat, but they did not succeed.

Affiant further says that he is positive that Mrs. Rhodes and her son remained together on the deck, as the boat in which he succeeded in escaping was the last one to leave the ship; that the scene made an impression on his mind that he will never forget; that after the boat in which he had gotten was some distance away the ship went down with a lurch and every one on board was drowned; that both of these parties died together, and, so far as this affiant was able to learn, after he saw these parties on the deck clasped in an embrace that would never be loosened until after death, no one else saw them; that he has no interest in this case and his acquaintance with the parties was simply by reason of his attention being attracted to them and the fact that when he last saw them the mother and son were standing in the manner he has stated.

Upon the foregoing facts it was decreed that the Young Women's Christian Home was entitled to the fund, and it was ordered to be paid over accordingly. From that decree all of the other parties have appealed.

Mr. J. M. Wilson and *Mr. A. A. Hoehling, Jr.*, for the appellants, *Barbara Faul* and *Andrew Waesner*:

1. Where two or more persons perish in a common disaster, and the order of their deaths is unascertainable by evidence, there is no legal presumption of survivorship in favor of any such persons, and in such case property rights are disposed of as if death had occurred to all at the same time. *The King v. Hay*, 1 Wm. Blackst. 640; *Wright v. Sarmuda*, decided in 1793 by Sir William Wynne; *Taylor v. Diplock*,

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2 Phill. 261. See, also, *Murray*, 1 Curteis, 406, and *Satterthwaite v. Powell*, 1 Curteis, 429.

There were two, possibly three, cases in which the English courts seemed to indulge in a presumption of survivorship or of codemise. See *Sillick v. Booth*, Younge & Collyer Ch. Rep. 121, and *In re Selwyn*, 3 Hagg. Eccl. Rep. 748. But the question was finally and definitely settled in *Underwood v. Wing*, 19 Beav. 459, which is now universally accepted, both in England and in this country, as correctly expounding the common-law doctrine. In that case it was held that, in the absence of evidence, it could not be assumed that either of two persons lost in a common disaster was the survivor. The case was appealed, and again exhaustively discussed, but with the same result. 4 De G., M. & N. 633. The case then went to the House of Lords, with a like result, the decisions below being approved. 8 H. L. 183. Since that case the law has been definitely settled in England on the basis of that decision. See, also, Greenleaf on Evidence, vol. I, Secs. 29 and 30; Taylor on Evidence, Secs. 202 and 203; Best on Evidence, pp. 393, 394; Wharton on Evidence (2d ed.), Sec. 1280, and 2 Kent's Commentaries (13th ed.), Sec. 435; *Coye v. Leach*, Adm'r. 8 Met. 371; *Russel v. Hallet*, 23 Kan. 276; *Ehle's Estate*, 73 Wis. 445; *Johnson v. Merrithew*, 80 Me. 111; *Newell, Ex'r, et al. v. Nichols*, 12 Hun, 607; S. C., 75 N. Y. Ct. App. 78; *Cowman et al., Ex'rs, v. Rogers et al.*, 33 Md. 403.

Such was also the rule of the Danish law.

2. It is not permissible, under the guise of construction, to incorporate distinct provisions into a will, nor to insert therein conditions or contingencies not provided for by the testatrix. 2 Redfield on Wills, 283; 1 Roper on Legacies, 750. See, also, *Illinois Land and Loan Company v. Bonner*, 75 Ill. 317, and *Heald v. Heald*, 56 Md. 300, 313; *Gibson v. Seymour et al.*, 102 Ind. 485; *Rupp v. Eberly*, 79 Pa. St. 141.

The court below, in its opinion, refers to several authorities, particularly decisions of the Supreme Court of the United States, which are apparently cited in support of

the court's holding; but those authorities, it is respectfully submitted, do not sanction the changing of a will, as was done in this case. Those cases are: *Finley et al. v. King's Lessee*, 3 Pet. 346; *Clark v. Boorman's Executors*, 18 Wall. 493; *Colton v. Colton*, 127 U. S. 300; *Lee v. Simpson*, 134 U. S. 572; *Robison v. Orphan Asylum*, 123 U. S. 702; *Metcalf v. Framingham Parish*, 128 Mass. 370, 374.

In none of these cases did the court sanction the changing of a will, by construction, by incorporating therein a distinct provision and condition.

Redfield, in his work on Wills (vol. 1, 4th ed.), has expressed, with evident care and with clearness, the rules followed by courts in the *construction* of wills, and the extent to which courts may go in respect of such matter. An heir can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed. 1 Jarman on Wills, 465; *Rupp v. Eberly*, *supra*.

3. The decree of the court below was further erroneous in so far as it undertook to dispose of property not embraced in the bill of interpleader and not within the jurisdiction of the court.

Mr. J. W. Smith and *Mr. Wm. Henry Dennis* for the administrator and appellant, John L. French:

Mr. John B. Larner and *Mr. J. J. Darlington* for the appellee, the Young Women's Christian Home:

1. The testimony relied upon on behalf of the claimants through the son is, in brief, that he, being the younger, stronger, and a good swimmer, should be presumed to have survived. That, under the common law, evidence of this character is insufficient to create any presumption upon which courts can act, is established by the authorities, from the earliest times and uniformly. The rule is variously stated, either that, in the absence of evidence to prove the

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fact, both parties will be presumed to have died at the same time, or that the course of distribution and descent will be the same as if the deaths had been simultaneous. *Bradshaw v. Toumlin*, 2 Dick. 633; *Wright v. Samada*, 2 Phill. 261; S. C., 2 Salk. 593; *Satterthwaite v. Powell*, 1 Curteis, 705; *Durrant v. Friend*, 5 DeG. & Sm. 343; *Barnett v. Tugwell*, 31 Beav. 232.

In *Underwood v. Wing*, 19 Beav. 459, H. L. Cases, 183, the Master of the Rolls, the Lord Chancellor, and the House of Lords concurred in the conclusion that, under the common law, there could be no presumption, in the absence of proof, of prior decease, although the husband was in good health, a very strong and powerful man and an able swimmer, while his wife was in delicate and weak condition, and their sons of tender age; and this has ever since been the accepted conclusion in the English courts. *In re Wainright*, 1 Swab. & Trist. 257; *In re Ewart*, 1 Swab. & Trist. 258; *In re Wheeler*, 31 L. J., P. & M. 40.

In America, the current of authority is to the same effect, a leading case being that growing out of the loss at sea of Mrs. Ridgeway, sixty-nine years of age; her son-in-law, forty-five years of age, and her grandchildren, aged ten and seven years, out of which grew *In re Ridgeway*, 4 Redf. 226; *Stinde v. Goodrich*, 3 Redf. 87; *Newell v. Nichols*, 12 Hun, 604, and *Newell v. Nichols*, 75 N. Y. 78, all holding that there is no presumption of prior decease in cases of this character, without evidence tending to prove the fact.

To similar effect is *In re Hall*, 9 Central Law Journal, 381; *Johnson v. Merithew*, 80 Me. 111; *Cowan v. Rogers*, 73 Md. 403.

2. The contention of the parties claiming through the testatrix herself is the technical one that her will should fail, because, technically, it gives her estate to her son only in the event that he survived her, or to the Young Women's Christian Home only in the event that she survived him, neither of which events, as a matter of fact, can be certainly determined.

It is submitted, both upon principle and upon authority,

that this cause should be decided upon a broader principle than either of these opposing claims; namely, upon the principle that a will is to be construed, not according to its letter, but according to its intent, and that mere verbal omissions, or strict literal criticisms or interpretations, are not to defeat the obvious wish of a testator, where the real intention is sufficiently plain.

The principle here urged, and the reasons for it, may be illustrated by what is believed to be the only case opposed to it, namely, that of *Underwood v. Wing*, reported in the House of Lords under the title of *Wing v. Angrave*, 8 H. L. Cases, 183.

In that case, Mr. Underwood and his wife, together with their three children, were lost at sea. He left a will devising and bequeathing all his estate to William Wing, in trust for his wife if she survived him, in trust for their children if the wife should die; but, should the children die before attaining the age of twenty-one years and unmarried, then the whole estate to be the property of Mr. Wing. The wife, also, left a will, devising and bequeathing her property to Mr. Wing, for his sole use and benefit, in case her husband died in her lifetime, and subject to the children's interests.

Under these wills, both the husband and wife, together with their children, having died practically simultaneously, it was clearly the intent of both testators that their estates should pass to Mr. Wing; and this view of the matter was presented in the House of Lords by Lord Campbell, in his dissenting opinion, with great clearness and force. See 8 H. L. Cases, 199. The case was decided, it is true, upon the narrower ground that, as Mr. Wing could not show either that the death of the husband occurred in the wife's lifetime or that the wife's death occurred in the husband's lifetime, he could receive neither estate; and as has been well commented upon the case, the result was that the courts were led "to make a new will for both the Underwoods, whereby they entirely set aside the family friend, whom both husband and wife had endeavored to honor, and to

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substitute in his place a person whom both had labored to exclude from participation in their estates." In this result, it is believed, *Underwood v. Wing* has never been followed by any other court. In instances of intestacy or cases of analogous nature its conclusion that there is no presumption of survivorship, either from relationship, age, relative condition of health or the like has been followed, it is believed uniformly; but we have found no other case in which the manifest intent of the testator has failed of effect through technical and literal adherence to the language of the will, without regard to its spirit and intent.

It is claimed by the other side that the doctrine of *Underwood v. Wing* has never been questioned, but has since been accepted by all courts as the undisputed doctrine governing in such cases. This claim is substantially true in so far as *Underwood v. Wing* repudiates the proposition that the fact of survivorship can be determined upon the speculative, uncertain and unsatisfactory conjectures to which age, sex and physical conditions may give rise; but it is believed that no case can be found in which the doctrine of the case in question has been recognized or followed in its subordination of the plain, manifest intent of the testator, to the strict letter of the language employed in the instrument.

Of the cases cited in the opposing briefs, *Russell v. Hallett*, 23 Kan. 194; *Johnson v. Merithew*, 80 Me. 111; *Cowman v. Rogers*, 73 Md. 403, and *Ehle's Estate*, 73 Wis. 445, are cases in which no question of the construction of wills was involved, there being no will in any of them except *Ehle's Estate*, and, in that case, the circumstances establishing the fact satisfactorily that the testator was the first to die, and no question either of following or of frustrating the testator's intent being involved.

The only case, it is believed, subsequent to *Underwood v. Wing* and involving any similar question as to the construction of a will, is that of *Newell v. Nichols*, 12 Hun, 604, affirmed in 75 N. Y. 78; and in that case the decisions of both the lower and the appellate tribunal were contrary

to that in *Underwood v. Wing*, and in entire harmony with the decision of the court below in the present case.

The principle here contended for, namely, that the intent of the testator is to be given effect, without regard to a literal adherence to the language used, where such literal adherence would defeat the testator's manifest desire, is laid down in all the text-books and authorities, and is illustrated by many decided cases. See Willes Reports, p. 682; *Town v. Wentworth*, 11 M. P. C. 520; *Abbott v. Middleton*, 7 H. L. Cases, 68; S. C., 21 Beav. 143; *Liston v. Jenkins*, 2 W. Va. 62, and cases cited; *Cox v. Britt*, 22 Ark. 567, and cases cited; *Chapman v. Brown*, Burr. 1635; *McKeehan v. Wilson*, 53 Pa. St. 74; *Aulick v. Wallace*, 12 Bush, 531; *In re Redfern*, 6 Ch. Div. 133; *Doe dem. Leach v. Micklem*, 6 East, 486; *Eatherly v. Eatherly*, 1 Cold. 461; *Freeman v. Freeman*, 8 Vin. Abr. Tit. Devise, 51; *Sessoms v. Sessoms*, 2 Dev. & B. 453; Perry on Trusts, Sec. 724; *Key v. Key*, 4 DeG. M. & G. 73; *Pearsoll v. Simpson*, 15 Ves. 29. The opinion in the last cited case is referred to, approved and followed by the Supreme Court of the United States in *Robinson v. Portland Orphan Asylum*, 123 U. S. 702, a case, also, bearing a close analogy in principle to the case at bar.

Among many other authorities stating the principle may be cited *Smith v. Bell*, 6 Pet. 68, 80; *Patch v. White*, 117 U. S. 210; *Newell v. Nichols*, *supra*, *et passim*.

An authority apparently in opposition to this view is cited in the brief on behalf of the appellants, Faul and Waesner, namely, the case of *Gibson v. Seymour*, 102 Ind. 485. This case would seem to be distinguishable in its facts and in its circumstances from the case now under consideration, and to fall under the observations of the Supreme Court of the United States in *Robinson v. Portland Orphan Asylum*, *supra*.

The application to the present case of the principle established by these authorities is plain. No one can read Mrs. Rhodes' will without recognizing, beyond the possibility of a doubt, that she intended to dispose of the whole of her

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estate, and that, unless her son lived, in the language of the Supreme Court in 123 U. S., p. 709, "to receive the gift intended," she purposed that it should pass to the Young Women's Christian Home. There is no room for question or dispute over these propositions; the only controversy possible is, whether the language employed to carry out this unmistakable intention is to be construed with a critical liberalness which shall defeat it, or whether "the intention is to be carried into effect, where apparent, although expressions must be discarded or modified to effectuate that purpose" (*Town v. Wentworth, supra*); whether, in the words of Lord Mansfield, "implication shall supply verbal omissions, the letter shall give way, every inaccuracy of grammar, every impropriety of terms, shall be corrected by the general meaning, if that be clear and manifest" (*Chapman v. Brown, supra*); whether the construction of the will shall be made "to depend much more upon the evident intent of the testator than upon the strict import of any term that he may make use of" (*Lambert's Lessee v. Paine, supra*); whether the clearly perceived intent "must prevail, although in giving effect to it some words should be rejected or so restrained in their application as to change their literal meaning in the particular instance" (*Finlay v. King's Lessee, 3 Pet. 377*).

Mr. Justice SHEPARD delivered the opinion of the Court:

1. All that is certainly shown in the evidence agreed upon by the parties is, that the testatrix, Sophia Rhodes, and her son, Eugene, perished in the same disaster. There is no evidence upon which to base a judicial opinion that either survived the other; and in adjudicating the rights of those claiming under either of them the order of their deaths must be considered as judicially unascertainable.

Unlike the Roman law, and the modern laws of some countries and States derived or adopted therefrom, the common law indulges no presumption of survivorship, whatever may have been the age, sex, or physical condition of the

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respective persons proved to have lost their lives in a common disaster. It requires evidence as the basis of its action.

It would prove a useless consumption of time to review the older cases in England involving this question; for whatever doubt may have existed by reason of certain expressions used in some of them, has been finally set at rest by the decisions in two noted cases — one by the Lord Chancellor with the aid of two common-law judges, and the other by the House of Lords. *Underwood v. Wing*, 4 DeG. M. & G. 633; *Wing v. Angrave*, 8 H. L. Cases, 183.

The American courts before which the question has come have enounced the same doctrine substantially. *Coye v. Leach*, 8 Metc. 371; *Newell v. Nichols*, 75 N. Y. 78; *Cowman v. Rodgers*, 73 Md. 403; *Russell v. Hallett*, 23 Kan. 194; *Johnson v. Merithew*, 80 Me. 111; *Estate of Ehle*, 73 Wis. 445; *Smith v. Armistead*, 7 Fla. 81; *Paden v. Briscoe*, 81 Tex. 563.

2. Admitting the rule of the common law as stated, and assuming that the order of death of mother and son in this case is unascertainable from the evidence, it has been contended that the property rights of those who claim under each decedent must be determined as if death occurred to each at the same instant. This view seems to have support in the language used in its opinions delivered in some of the American cases above cited, but we cannot accept it as logical and sound. It seems to us nothing less, in reality, than the substitution of one presumption for another — the, if anything, more unreasonable presumption of simultaneous death, for the rejected presumption of survivorship. Presumptions failing, the law requires evidence as a foundation for action upon either hypothesis. On application to the courts, there is always a burden of proof, slight though it may often be, upon him who has the affirmative, and if he fails to discharge it with evidence reasonably sufficient for the purpose, he must suffer the consequences of failure. His opponent succeeds, not upon proof of his own case or defense, but by reason of the absence of evidence on the necessary point.

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In our opinion, therefore, the distribution of the personal estate of which Mrs. Sophia Rhodes was possessed at the time of her death must depend upon the ascertainment of the party whose position in the case is such that he must succeed because of the failure of evidence to establish the essential fact of survivorship.

3. The claim of the Young Women's Christian Home will first be considered.

If the will is to be construed as making the death of Eugene Rhodes, in the lifetime of his mother, a condition precedent to the taking effect of the bequest over, then it is quite clear that the burden of proving that fact is thrown upon the legatee and has not been discharged.

The question now occurs, and it is to it that the weight of the argument has been directed: Whether the will is to be so construed?

The contention on behalf of the legatee is, substantially, that the obvious intention of the testatrix was to avoid intestacy absolutely, and that the Home should take her estate not only upon the event expressly provided for, but also in case, as here shown, where her son, who was the first object of her bounty, could not possibly survive to take any practical benefit.

The argument in support of this contention prevailed with the learned justice who presided at the hearing and determined the decree rendered. It was conceded by him, as his opinion in the record shows, that, giving the words of the fourth item "their literal meaning, it must be held that the contingency therein named has not been shown to have happened." But he was of the opinion that the general intention of the testatrix that the Home should have the benefit of her estate, if her husband and son were not able to take beneficially, was so apparent, the will must be construed as if either of the following clauses had been inserted therein by the testatrix:—"Or in the event that my husband and son die at the same time with me,"—"or in the event that my husband and son do not survive me."

We are constrained to differ from this conclusion. It is

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undoubtedly true, that "the intent of the testator is the cardinal rule in the construction of wills;" but this intention must be found in the language of the will itself. Where such general intention is found, considerable latitude has been permitted in the way of rejecting the literal meaning of some words when irreconcilable with the context, and even in supplying words to give effect to this general intention, where it is plain that the testator has incompletely expressed his apparent meaning, and it is also plain what those words are which he must have meant to use, and yet, through negligence or ignorance, omitted. In such cases the construction is founded on the apparent condition of a contingency, or state of circumstances, present in the mind of the testator at the time, and which he has imperfectly described or provided for. But when the testator has evidently overlooked, or failed to apprehend, a particular contingency which might occur and change the course which his estate would otherwise take, the courts are not at liberty to read into the will a clause providing for that contingency, although they might believe generally that the testator would have inserted it had attention been called to it when the will was written and executed.

This very question was involved in the case of *Wing v. Underwood*, 4 DeG. M. & G. 633, 654, and after careful consideration the decision was against the construction contended for. The condition upon which the bequest to Wing depended was: "And in case my wife shall die in my lifetime, then," etc. Husband and wife perished in the same shipwreck, and there was no proof of survivorship. Lord Chancellor Cranworth, in disposing of the question, said:

"The gift to Mr. Wing is in terms made dependent, and was evidently meant to be dependent, on the single event, setting aside the children, of the testator surviving his wife: If she should survive, he gives everything to her, if she dies in his lifetime he gives everything to Mr. Wing; it is impossible to say that there is any third case, or class of cases, to which the language of the will could possibly be appli-

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able. It may be that, if the extremely improbable event which did occur had presented itself to the testator's mind as a possible contingency, he would have wished Mr. Wing to take his property; but then he would have done this, not by relying on the words now found in the will as being sufficient for the purpose, but by making express provision to accomplish his object.

"It is not sufficient to say that, if for any reason the gift to the wife fails to have practical operation, the testator must have intended to benefit Mr. Wing; the answer is, he has not said so, neither expressly nor impliedly; and if I were to attempt to supply the omission I feel that I should be making, not construing, the testator's will."

The same question was later considered in the House of Lords in the case arising under the will of Mrs. Underwood, which gave her property to Wing also, in case her husband should die in her lifetime, and the same decision followed. *Wing v. Angrave*, 8 H. L. Cases, 183, 207, 215, 223. In giving his opinion, Lord Wensleydale said:

"No one can doubt as to the testatrix's 'intention,' in the loose sense of that word. No one can suppose that she really meant not to give the property to Wing, if her husband and herself should happen to die at the same moment. No one doubts that, had she thought of such a possibility at the time she made her will, she would have provided for it by express words. But it cannot be too often repeated, that the true question in all these cases is, not what the testatrix intended to do, but what is the meaning of the words used in the will."

In the same case, Lord Chelmsford used the following language, which seems to us directly applicable to the conditions of the case at bar:

"In forming my judgment in this case, I have had to struggle with my strong inclination so to construe the will as to give the appellant the benefit under it, of which he has been deprived by a singular and unforeseen accident. I would gladly have found anything which either expressly or by necessary implication manifested an intention that

he should take at all events upon the failure of the gift to Mr. Underwood.

"But it must be conceded, that the event which has happened was so extraordinary and improbable, that it was not likely to have occurred to the mind of any one, and, therefore, no provision for it could have been contemplated. We may, indeed, speculate with great probability, if not with certainty, as to what the form of bequest would have been, if the possibility of such event had been suggested; but to act upon such a speculation would be to make the will speak a different language for the purpose of satisfying an intention which could not have been conceived, and, therefore, could never have been meant to be expressed."

Another omission of this will tends to illustrate the impropriety of giving it the construction founded upon what has been aptly called, "the testatrix's 'intention' in the loose sense of that word." No provision is made for the contingency of Eugene Rhodes' death leaving issue. Consequently, upon the construction contended for, if he had married and left a child surviving him, that child would be cut out. This contingency, far more likely of apprehension than the one that did happen, was no more present in the mind of the testatrix than was the other. And there is nothing in the will or the circumstances surrounding the parties, that would justify any other conception than that had it occurred to her she would have provided for it by apt words for the purpose.

The case of *Newell v. Nichols*, 75 N. Y. 78, which is the authority most strongly relied on by the appellee, appears to us to be distinguishable.

The will vested the entire estate in trustees for the purpose of raising certain specified funds. The interest upon one fund was directed to be paid to a daughter during her life, with remainder to the heirs of her body, if then living. In default of heirs of her body living at the time of her death, she had the power to appoint by will to whom she pleased. In default of said heirs living at the time of her death, or of the exercise of the power, the remainder was to the

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heirs of the heirs of the body of the testatrix, then living, and in default of these, over to the heirs of Frederick Ridgway and others. A like fund was to be raised for the benefit of her son upon corresponding limitations. A third fund was to be raised for the benefit of her husband during his life, with remainder to the heirs of testatrix's body then living, and in default of such heirs living at the time of her death, then over to Ridgway and others also. After the death of testatrix, her husband and mother, and the two children who were under the age of ten years, were lost in the wreck of the steamship "Schiller," and there was no evidence from which survivorship could be ascertained. It was held, that the property had never vested in the children under the will, but the title had remained in the trustees until their death—the trust being valid and active, title was necessary to its execution; that the remainder over was a conditional limitation and not a condition precedent; and that the intent of the will was that it should be effectual if for any reason the children could not take. Following *Wing v. Angrave*, in respect of the doctrine of presumption, it was held that the appellants, who claimed under the two children, were charged with the burden of proving their title to some specific share or interest, and were not aided by their alternative claims. It was said by Chief Justice Church, who delivered the opinion of the court: "As to the daughter's share there was a failure to prove a title because it does not appear that the son survived the daughter, and the same is true of the share of the son."

The court also, incidentally, recognized the distinction between the will of Mrs. Ridgway and that of Mrs. Underwood, by agreeing that the survivorship of the latter was a condition precedent to the taking of an interest by Wing.

In the next case relied on, the will is very different from the one under consideration. *Robison v. Portland Orphan Asylum*, 123 U. S. 702. From the terms of the will in that case, it was plain that the widow of the testator was intended to take an interest for life and nothing more, and that the testator wished to avoid intestacy in any event. But no

distinct words were read into the will to effectuate the aforesaid intention. The words, "at their death," which described the commencement of the gift over to the defendants, were reconciled with this plain intention, by taking them as indicating only the expectation of the testator, which he naturally indulged, that the beneficiaries named would not live to receive the gift intended, and not as requiring that the gift shall take effect at that time irrespective of the prior decease of the widow.

The final conclusion was stated as follows: "The limitations in the two subdivisions of the will are to be taken in connection with each other as a complete disposition in the mind of the testator of his estate, giving to the widow an estate for life, with an estate over for life to Ann Smith and Eleanor C. Robinson, contingent upon one or the other of them surviving the widow, with the ultimate remainder to the defendants."

4. Having disposed of the claim of the Young Women's Christian Home, the next question for consideration is: Upon whom lies the burden of proof as between the next of kin of Sophia Rhodes and the administrator of Eugene Rhodes?

One contention is, that the *prima facie* right is in the next of kin of the mother, whose estate is to be distributed, and that the burden of proof rests upon the representative of the son to displace them by showing his survival. This proposition has support in a number of decisions, some of which seem to be directly in point, while others are more or less analogous. *Coye v. Leach*, 8 Metc. 371; *Johnson v. Merithew*, 80 Me. 111; *Russell v. Hallett*, 23 Kan. 194; *In re Green's Settlement*, L. R. 1 Eq. 288; *In re Phene's Trust*, L. R. 5 Ch. App. 139.

On the other hand, the contention is, that upon the death of the mother descent was immediately cast upon the son, and, therefore, the burden lies upon the next of kin of the mother to show the prior decease of the son; in other words, that it is incumbent upon them to show the extinction of the intervening, preferential right of the son's representatives.

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The argument in support of this contention is founded upon the supposed analogy to the rule that prevails, in this jurisdiction, in actions of ejectment, which is: That the burden is upon the plaintiff to show not only his descent from some common ancestor with the person last legally seised, but also the extinction of all lines of descent that could take in preference. *Posey v. Hanson*, 10 App. D. C. 496, 505, and cases cited. See, also, *Skinner v. Fulton*, 39 Ill. 485, 495; *Emerson v. White*, 29 N. H. 482, 492; *Bates v. Schraeder*, 13 Johns. 260; *Stinchfield v. Emerson*, 52 Me. 465; *Payne v. Payne*, 29 Vt. 172; *Anson v. Stein*, 6 Iowa, 150, 152; *Delany v. Noble*, 3 N. J. Eq. 441, 445. And the rule seems to be substantially the same where the action is to recover, or establish a claim to personal property. *Schneider v. Piessner*, 54 Ind. 524, 525; *Gardner v. Kelso*, 80 Ala. 497, 501; 2 Woerner Law Admn. 1234; *Underwood v. Wing*, 4 DeG. M. & G. 633, 655, 659. In the last case it was said: "The next of kin stands as to personalty in the same position as the heir-at-law as to realty and the person claiming against him must make out his entire title.

"In the absence of any effectual disposition of the beneficial interest in personalty, the next of kin is entitled to it. and the person seeking to dispossess him of it is bound to prove a perfect title, and to rebut the *prima facie* case of the next of kin."

The foregoing, however, is to be taken in connection with the fact that the proof in that case showed the survival, for a brief space, of a child of Mr. Underwood; and that fact made a *prima facie* case for the representative of the child, which Wing was under the burden of overcoming by proving the existence of the condition upon which his title as legatee depended.

Nevertheless, the settled rule of law, as stated, governing the devolution of an estate as the legal consequence of the decease of its owner, would seem to furnish a strong foundation for the contention of the representative of the son in the case at bar.

At the same time, it is evident that, whilst the cases last

cited satisfactorily determine where the burden of proof lies and what is necessary to discharge its obligation, in cases where the plaintiff sues to recover the possession of property held by another under claim of title, and not as a mere trespasser or wrongdoer, none of them included in its decision the very question of this controversy: In whom vested the *prima facie* right upon proof of the death of the mother, regardless of the fact that the same evidence showed the death of the son in the same shipwreck? In other words, did the mother's next of kin take subject to displacement by proof of the son's survival? Or, did the son's next of kin succeed, subject to displacement by proof of the mother's survival?

Laboring under some divergency of opinion, we would have great difficulty in determining upon which of these parties the burden of proof lies, had Sophia Rhodes left no will. But, as there is a will under which her estate has been so far administered, to which we may look for a solution of the difficulty, and we are agreed upon the relations of the parties created thereby, we prefer to base our conclusion upon its provisions.

5. The husband of testatrix having died before her, it will be observed that item 2 of her will gives her entire estate absolutely to her son Eugene. Then follows item 3, containing the condition precedent to the bequest over for the benefit of the Young Women's Christian Home, and another for the husband's life, namely: "In the event of the death of my son Eugene Rhodes before the decease either of myself or of my husband, I then give," etc.

The condition is then repeated distinctly in the following form in item 4: "In the event of my becoming the survivor of both my husband Oliver Wheeler Rhodes, and of my son Eugene Rhodes, I then give, devise," etc.

The terms of the will, then, vesting the estate in Eugene Rhodes immediately upon testatrix's death, we agree that it raises a *prima facie* right in the personal representatives of the son, and imposes the burden upon her next of kin of displacing them by proof of his mother's survival.

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Proof of that fact having failed, it follows that the representatives and next of kin of the son are entitled to the entire fund. The decree appealed from is, therefore, reversed, with costs to be paid out of the fund in controversy, and the cause will be remanded with direction to enter a decree in conformity with this opinion. *Reversed.*

An appeal to the Supreme Court of the United States was taken and perfected by the appellant Barbara Faul and the appellee, the Young Women's Christian Home.

TYLER

v.

THE PENNSYLVANIA RAILROAD COMPANY.

RAILROADS; CONTRACTS FOR CARRIAGE.

In an action against the Pennsylvania Railroad Company for breach of a special contract for carriage, where it appeared that the plaintiff purchased, at Washington, D. C., from the Baltimore & Potomac Railroad Company, a round trip special excursion ticket to Atlantic City, N. J., entitling him to carriage on that railroad to and from Camden, N. J., and on the Camden & Atlantic Railroad from Camden to Atlantic City and return, which ticket was refused on the Camden & Atlantic Railroad on plaintiff's return from Atlantic City, it was *held*, upon the plaintiff's evidence, consisting of newspaper advertisements published in Washington prior to the purchase by plaintiff of his ticket, that special excursions would be run to Atlantic City by the Pennsylvania Railroad Company; proof that the general passenger agent of the defendant was also the general passenger agent of the two other roads; schedules of through trains between Washington and Atlantic City, published in a traveler's guide, in which the Baltimore & Potomac and Camden & Atlantic Railroads were embraced under the heading "Pennsylvania Railroad system;" extracts from an annual report of the directors of the Pennsylvania Railroad Company showing that the two roads mentioned belonged to the Pennsylvania Railroad system, and proof that the officials who arrested plaintiff at Camden for

failure to pay his fare wore buttons on their uniforms containing the letters "P. RR."—was insufficient to so connect the defendant with the other railroads as to render it liable to the plaintiff.

No. 1029. Submitted January 18, 1901. Decided March 7, 1901.

HEARING on an appeal by the plaintiff from a judgment of the Supreme Court of the District of Columbia upon a verdict directed by the court in an action to recover damages for breach of a contract of carriage. *Affirmed.*

The facts are sufficiently stated in the opinion.

Mr. Franklin H. Mackey and *Mr. Holmes Conrad* for the appellant:

1. The question here is, not whether the evidence offered by the plaintiff in support of the issues on his part was of sufficient weight to justify or compel a verdict in his favor, but whether the evidence offered by him was of "such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it." *Phoenix Ins. Co. v. Doster*, 106 U. S. 32. See, also, 9 App. D. C. 26; *Sparf and Hansen v. United States*, 156 U. S. 99; *Randall v. Balto. & Ohio RR. Co.*, 109 U. S. 482.

Whatever might be said as to the weight of this evidence, whether or not it was sufficient to justify a jury in believing it and attaching to it the weight necessary to a verdict, it cannot be denied that if the facts which it tended to prove were, in the opinion of the jury, well proven, the evidence would, as matter of law, support the verdict.

Stripped of all technical and merely formal phrase, the plaintiff's case, as he presents it, is that while traveling from Atlantic City to Washington he was assaulted by the servants of the defendant, and suffered injuries for which he here claims damages; that the servants of defendant, when they committed this assault, were acting within the scope of the authority conferred upon them for the discharge of the duties confided to them; that whether they were servants in

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the permanent or the temporary and occasional employ of the defendant is a matter of indifference so far as defendant's liability is concerned; that the defendant had undertaken by express contract to carry plaintiff from Washington city to Atlantic City and return, and to protect and shield him from such assaults as were inflicted upon him.

2. The relation between the plaintiff and the defendant was that of passenger and common carrier. The advertisements, making the proposition to the public to carry them on excursions to Atlantic City and return, were inserted in the newspaper by the Pennsylvania Railroad Company, through its agents, and were paid for by that company. The offer so made by the defendant company was accepted by the plaintiff, and thus the contract between these parties was closed. See *Denton v. Great Northern Railroad*, 5 Ellis & Blackburn, 860; S. C., 85 Eng. C. L. Rep. 860; *Sears v. Eastern Railroad*, 14 Allen, 433. The ticket does not contain all the contract, the rest of it is in what the railroad company advertises. *Gordorn v. RR. Co.*, 52 N. H. 596-599; *Quinby v. Vanderbilt*, 17 N. Y. 306; *Rawson v. Penn. RR. Co.*, 48 N. Y. 217; Wood on Railroads, Vol. 2, Sec. 312.

The ticket issued to the plaintiff at the Baltimore & Potomac station does not on its face purport to have been issued by the Pennsylvania Railroad Company, but by the Baltimore & Potomac Railroad Company. It was marked "Special Excursion Ticket," and provided on its face for a continuous passage from Washington to Atlantic City and return.

This ticket carried the plaintiff over the lines of the Baltimore & Potomac Railroad Company, the Philadelphia, Wilmington & Baltimore Railroad Company, and the Camden & Atlantic Railroad Company, and yet there are no coupons attached to it for the two latter roads, but it is a solid ticket, carrying the passenger from Washington city to Atlantic City over all three roads.

It purports to grant "a continuous passage" between the two terminal points of Washington and Atlantic City.

This the Baltimore & Potomac Company could not do, and

did not undertake to do. The advertisement making the offer, which the plaintiff here accepted, stated that—

“On Friday, the 10th inst., the *Pennsylvania Railroad Company* will run a select excursion to Cape May and Atlantic City at the very low rate of \$5.00 for the round trip.”

It was the defendant, then, that “held itself out” to the public as the responsible conductor and author of this excursion. See *Chesapeake & Ohio RR. Co. v. Howard*, 178 U. S. 161.

The Thirty-ninth Annual Report of the Board of Directors of the Pennsylvania Railroad Company to the stockholders, presented at a meeting held March 9, 1886, discloses the “physical and financial condition of the lines embraced in your system,” and states to the stockholders that—

“The statements immediately following show the results on the three divisions *operated by the company* east of Pittsburgh and Erie, viz.:

“1st. The Pennsylvania Railroad division.

“2d. *The United Railroads of New Jersey* division, &c.

“3d. The Philadelphia and Erie Railroad division.”

So it appears from this report that not only financially, but physically, the Pennsylvania Company was actually *operating* the United Railroads of New Jersey, of which, it appears, the Camden & Atlantic was a part.

Further, Mr. James R. Wood, a very reluctant and unwilling witness for the plaintiffs, was called by them and proved that he was at the period referred to and still was the general passenger agent of the Pennsylvania Company. He was asked the question: “Were not the roads in here operated by the Pennsylvania Railroad? Answer, Yes.”

He was shown copies of “Appleton’s National Railway and Steam Navigation Guide” and “Travellers’ Official Guide of the Railway and Steam Navigation Lines in the United States and Canada,” wherein the Pennsylvania Company appears to be operating the lines between Washington and Atlantic City, and the witness proved that he had furnished the information contained in those publications as to the Pennsylvania Company.

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The case of *Penn. RR. Co. v. Jones*, 155 U. S. 333, differed from this in at least two essential features. Here *there was* an "attempt to show a contract or agreement between the plaintiff and the Pennsylvania Railroad Company," and, we think, an attempt that was altogether successful, so far as the sufficiency of the proof went, and here, too, there was no effort to show that the Pennsylvania Company merely "controlled" the other companies by holding a majority of their capital stock, but there was direct and unimpeachable evidence offered to show that the Pennsylvania Company actually *operated* the line of the Camden & Atlantic Company. But it was not necessary to show that the Pennsylvania Company had *permanent* or complete control over the Camden & Atlantic, but only that on this particular occasion did it operate that train. See *Howard v. The Chesapeake & Ohio Co.*, *supra*, 166.

3. The relation of carrier and passenger cast upon the carrier the burden of protecting the passenger from the assaults of his servants, and the carrier was negligent in the duty imposed, and so is liable. See *Steamboat Company v. Brockett*, 121 U. S. 625; Cooley on Torts, 645.

4. Even though the plaintiff had not been a passenger, yet the defendant would be liable under the facts.

We assume the relation of carrier and passenger to have been established by the proofs offered in the trial below and here in the record, but suppose that such relation did not exist, but that plaintiff was a stranger on the premises of the defendant, but about his lawful business, and the assault here complained of was inflicted by officers, yet would the right of recovery be none the less clear and direct. Cooley on Torts, 538.

These officers proved to have had on the uniform of the Pennsylvania Railroad Company.

Mr. Frederic D. McKenney and *Mr. J. S. Flannery* (*Mr. Wayne MacVeagh* being with them on the brief) for the appellee:

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This action was instituted on the 20th day of November, 1885, and why it was so long pending before trial, which took place in June, 1900, does not appear. The action was brought by the appellant, Richard W. Tyler, against the appellee, the Pennsylvania Railroad Company, for personal wrongs and injuries committed against the plaintiff while a passenger on the Camden & Atlantic Railroad, running between the city of Camden and Atlantic City, in the State of New Jersey, and alleged to have been operated and controlled by the Pennsylvania Railroad Company. The declaration has been the subject of various amendments, the last amendment that was made was made and filed on November 1, 1899, upon which the trial was had.

This amended declaration contains two counts. By the first of these it is alleged that the plaintiff sues the defendant, a corporation doing business in the District of Columbia, and which was and is operating a number or system of railroads, among others the railroad commonly known as the Baltimore & Potomac Railroad, running between the city of Washington, in the District of Columbia, and the city of Baltimore, in the State of Maryland; also the railroad commonly known as the Philadelphia, Wilmington & Baltimore Railroad, running between the city of Baltimore and the city of Philadelphia, in the State of Pennsylvania; and also the railroad commonly known as the Camden & Atlantic Railroad, running between the cities of Camden and Atlantic City, in the State of New Jersey, and carrying on by its servants and agents the business of common carrier of passengers for hire over said roads, from the city of Washington to said Atlantic City; and the defendant being such common carrier of passengers, by notice and advertisement to that effect, published in the city of Washington, District of Columbia, offered to carry any person from the said city of Washington to said Atlantic City and thence back again, for and in consideration of the sum of \$5 for each person.

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to be paid to the defendant in that behalf; and in response to and in accordance with said offer the plaintiff paid to the defendant or its duly authorized agent the said sum of \$5, and received from the defendant or its agent a certain railroad ticket, commonly called a special excursion or round trip ticket, as evidence of the payment of the price and of the right of the plaintiff to be carried by the defendant or its agents from the city of Washington to Atlantic City and return. That thereupon the plaintiff on the 21st day of August, 1885, at the city of Washington, did embark and was by the defendant or its agents received upon a certain train of cars for the carrying of passengers, operated by the defendant or its agents, between the city of Washington and the city of Philadelphia, and was carried thereon to the last-named city, and thence was further carried by the defendant or its agents, by way of ferry-boat, across the Delaware river, to said city of Camden, and from thence was further carried by the defendant or its agents, by certain other train of cars, operated by the defendant or its agents, to said Atlantic City. The plaintiff further alleges, that on the 24th day of August, 1885, he being then in Atlantic City and desiring to avail himself of the said return trip ticket, and to return by the aforesaid route to the city of Washington, as by the defendant's contract and agreement he was lawfully entitled to do, by tendering to the defendant or its proper agents the said round trip ticket, embarked at said Atlantic City upon one of the return trains of the Camden & Atlantic Railroad aforesaid, operated by the defendant or its agents, and upon which he was lawfully entitled to ride, as aforesaid; and being upon said train and having been carried a part of the way, one of the agents of the defendant, then acting as conductor of the train, was tendered by the plaintiff the said return ticket, but the conductor refused to accept the same, and demanded of the plaintiff railroad fare from said Atlantic City to Camden, which the plaintiff refused to pay. Thereupon the conductor loudly threatened, before a large crowd of passengers, to eject the plaintiff from said train; and thereafter, upon the arrival of the train at

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Camden, he was subjected to arrest, etc., and other maltreatment and indignity, to the great mortification and injury of the plaintiff, etc.

2. By the second count it is alleged, that the defendant, being a corporation doing business in the city of Washington, was, on or about the 21st day of August, 1885, and for some time previous thereto, engaged in running of excursions by railway to Atlantic City, in the State of New Jersey, from the city of Washington, in the District of Columbia, and did, on or about the date mentioned, by notice and advertisement to that effect, publish in the city of Washington, an offer to carry any person from the city of Washington to Atlantic City and thence back again for the sum of five dollars for each person, to be paid to the defendant in that behalf; and in response to and acceptance of said offer of the defendant, the plaintiff paid to the defendant, or its duly authorized agent, the sum of five dollars, and received from the defendant or its agent a certain railroad ticket, commonly called a special excursion or round trip ticket, as evidence of the payment of the price and of the right of the plaintiff to be carried by the defendant or its agents from the city of Washington to Atlantic City and return. That thereupon the plaintiff, on the 21st of August, 1885, at the city of Washington, did embark and was by the defendant or its agents received upon a certain train of cars for carrying of passengers, operated by the defendant or its agents, running, etc. Then follow or are repeated the same allegations contained in the first count, the only difference being that in this second count the name of the Camden & Atlantic Railroad is omitted, and the general allegation made that the plaintiff was carried by a certain train of cars operated by the defendant or its agents; and so in the return from Atlantic City.

The defendant pleaded to the amended declaration, (1) That it was not guilty as alleged; (2) That it was not, on the 21st and 24th days of August, 1885, and never has been, engaged in operating the Baltimore & Potomac Railroad, Philadelphia, Wilmington & Baltimore Railroad, or the

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Camden & Atlantic Railroad, or any one of them, as in and by the first count of the amended declaration is alleged; (3) That it was not, on the 21st and 24th days of August, 1885, and never has been, engaged in the business of common carrier of passengers from the city of Washington, in the District of Columbia, to Atlantic City, in the State of New Jersey, as in said amended declaration is alleged; (4) That it never was engaged in running excursions by railroad to Atlantic City, in the State of New Jersey, from the city of Washington, District of Columbia, as in said amended declaration is alleged. Issue was joined on these pleas.

As appears by the allegations of the declaration, the action is upon a special contract for carriage, and the onus of proof is upon the plaintiff to show that the defendant entered into such contract and became bound thereby. If the alleged contract was one made by another separate and distinct railroad corporation, engaging with the plaintiff for safe carriage from the city of Washington to Atlantic City and return, over several roads, not operated and controlled by the defendant, then, clearly, there is no ground for maintaining this action against the defendant. But if, on the other hand, the contract for carriage was really and in fact made by and with the defendant company, engaging to furnish passage to the plaintiff over several roads, and the wrong complained of was perpetrated on the plaintiff while being carried over one of such roads by virtue of the contract for carriage, and over which, or the particular train, the defendant had control, and operated the same, then the defendant might be shown to be liable to this action under the special contract as alleged in the declaration.

There is no pretense that there was a joint contract by the defendant and all or any of the railroad companies mentioned in the first count of the declaration, with the plaintiff; and if there was a contract of carriage by the defendant with the plaintiff, it must have been made, according to the proof, by and in the name of the Baltimore & Potomac Railroad Company, as constituting part of the defendant company, or as partner therewith. When a passenger makes a contract

for carriage or transportation with one railroad company, the carriage to extend over several roads, and he suffers wrong or injury in the journey from the servants and agents of one of the roads other than that from which he obtained his ticket, or with which he made the contract for carriage, there being a joint arrangement between the railroad companies for carrying on the common business, the first carrier will be responsible for the wrong as well as the one actually committing it. If the wrongful act complained of is the joint act of two carriers either may be answerable in an action of tort, or both may be joined, or the plaintiff may sue in contract the carrier with whom he is himself in privity, that is, with whom he made the contract. *McElroy v. Nashua & Lowell RR. Co.*, 4 Cush. 400; *Eaton v. Boston & Lowell RR. Co.*, 11 Allen, 500. If, however, the action be one on contract, as in this case, to entitle the plaintiff to recover, he must show a breach of the contract by the defendant as between the plaintiff and defendant, or otherwise the action fails. *Boylan v. Hot Springs RR. Co.*, 132 U. S. 146, 150.

The effort to show that the contract for carriage was made with the defendant, and that the latter is liable thereon for the wrong complained of, is made by proof of a circumstantial character.

It appears that the plaintiff, on the 21st of August, 1885, applied for and obtained at the railroad depot or office at Sixth and B streets, in the city of Washington, known as the Baltimore & Potomac Railroad depot, an excursion or round trip ticket, for which he paid \$5, that being a reduced price, for passage from the city of Washington to Atlantic City and return. That ticket was given in evidence by the plaintiff, and it is necessary to examine it with some particularity, in order to determine with whom the contract was made, and what that contract, in legal effect, really was.

The ticket on its face professes to be a special excursion ticket of the Baltimore & Potomac Railroad Company. It is in two parts or coupons. The one is from Washington,

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D. C., to Atlantic City, or Cape May, N. J.; and the other, or return part, is from Atlantic City or Cape May, N. J., to Washington, D. C. Both parts are signed by J. R. Wood, general passenger agent. In the part or coupon from Washington, D. C., to Atlantic City or Cape May, N. J., there is the following: "In consideration of the reduced rate at which this ticket is sold, the coupon will be received for a continuous passage only on train leaving at 11 A. M., on August 21, 1885, is not good to stop off, and is void if detached."

Opposite to this, in the margin, in transverse order, is the following notice to purchasers: "Please take notice that this ticket must be stamped by agent of the West Jersey Railroad, or Camden & Atlantic Railroad agent, at Atlantic City, N. J., or the West Jersey Railroad agent at Cape May, N. J.; otherwise it will not be received for return passage; and that after it is so stamped by said agent it will be valid only for continuous return passage to starting point on date so stamped."

The second part, headed "Return Coupon," is as follows:

"In consideration of the reduced rate at which this ticket is sold, it will be received for passage on any regular train, except the 'New York & Washington Express,' until August 26th, 1885, inclusive, if stamped by the West Jersey or Camden & Atlantic Railroad agent at Atlantic City, N. J., or the West Jersey Railroad agent at Cape May, N. J., and is valid only for a continuous passage on the date stamped, and is not good to stop en route." On the back of each of the coupons is indorsed: "Washington, D. C., Aug. 21, 1885, B. & P. RR."

The Baltimore & Potomac Railroad Company that issued the ticket just recited, was, and is still, a railroad corporation regularly organized and in full operation, deriving its corporate powers from the State of Maryland and the Congress of the United States; and the Camden & Atlantic Railroad Company, referred to in the ticket, is a regularly organized corporation, deriving its charter from the State of New Jersey.

Upon the ticket obtained as we have stated, the plaintiff was carried to Atlantic City; and on the 24th of August, 1885, without having the ticket stamped according to requirement, the plaintiff boarded a train of the Camden & Atlantic Railroad for the city of Camden, on his way home. When the tickets were called for by the conductor of the train, the plaintiff offered his ticket, which was refused, because it had not been stamped as required. Upon the plaintiff refusing to pay regular fare, he was, in a loud and peremptory tone, told by the conductor that he must leave the train, or he would be put off. By remonstrance, however, the matter was deferred until the train reached Camden, where the plaintiff was arrested by officers, called upon to act by the conductor, under circumstances and notoriety very mortifying and humiliating to the plaintiff, and he was taken before the superintendent of the road, by whom he was at once discharged, with the announcement that the stamping of the ticket had been, for some time before, dispensed with.

The condition on the ticket requiring the holder thereof to have it stamped by the agent of the road upon which it was intended to be used on the return passage, has been held by the Supreme Court of the United States to be a valid condition, the noncompliance with which renders the ticket void. *Mosler v. St. Louis Iron Mountain Railway*, 127 U. S. 390; *Boylan v. Hot Springs R.R. Co.*, 132 U. S. 150. But here, so far at least as the Camden & Atlantic Railroad was concerned, the condition had been waived or ignored, and it may, therefore, be treated as immaterial in this case.

For the purpose of identifying the Baltimore & Potomac Railroad and the Camden & Atlantic Railroad with the Pennsylvania Railroad, and to show that the two former roads were in fact operated and controlled by the Pennsylvania Road, certain items of proof were offered. There were offered certain advertisements, published in a newspaper in the city of Washington, of special excursions to Atlantic City *via* the Pennsylvania Railroad; but published

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some time prior to the 21st of August, 1885. One of these advertisements read thus: "On Friday, the 10th inst., the Pennsylvania Railroad Company will run a select excursion to Cape May and Atlantic City, at the very low rate of \$5 for the round trip." But this advertisement was published some time in July, 1885. It was also shown in proof that the general passenger agent of the Pennsylvania Railroad Company was also the general passenger agent of the Baltimore & Potomac Railroad Company, and of the Camden & Atlantic Railroad Company, and had his office for those roads in the building of the Pennsylvania Railroad Company.

The plaintiff also gave in evidence certain schedules of through trains from Washington city to Atlantic City, in which the Baltimore & Potomac and Camden & Atlantic roads are embraced, published in the "Travellers' Official Guide," under the heading, "Pennsylvania Railroad System;" and also gave in evidence, for the same purpose, certain extracts from the Thirty-ninth Annual Report of the Board of Directors of the Pennsylvania Railroad Company to its stockholders for the year 1885, as showing that the two roads just mentioned were treated as belonging to the Pennsylvania Railroad System. But the report does not show that those two railroad companies were embraced in the accounting department of the Pennsylvania Railroad Company, but only as companies in which the Pennsylvania Company had large investments of stocks and bonds. It was also shown in evidence that the officers who arrested the plaintiff at Camden city wore buttons on their uniforms upon which were the letters "P. RR.," supposed to stand for Pennsylvania Railroad; and thus showing that that company was in control of the Pennsylvania Company.

Upon all the facts of the case, the court below, upon the request of the defendant, directed a verdict to be entered for the defendant, to which exception was taken by the plaintiff. It is difficult to perceive how the court below could have ruled otherwise than it did, with the case of the *Pennsylvania Railroad Company v. Jones*, 155 U. S. 333, 345,

before it. All the facts in proof in this case were in proof in that, with some additional proof that made that case stronger for the plaintiff than the present. The two cases relate to precisely the same time, and each was and is based upon substantially the same theory of liability, with the exception that the case of Jones was an action in tort for personal injuries, and the present is an action upon contract for personal wrong to the plaintiff; the one founded upon the common-law obligation of a carrier to carry safely, and the other upon an alleged special contract to carry safely. To maintain the action in either case, however, there must be shown that there was a legal duty to perform, and a breach of that duty, such as would sustain an action. And upon the same facts that are shown in proof in this case, the Supreme Court held that there was nothing in those facts that would render the Pennsylvania Railroad Company liable, as one of the defendants in the case of Jones.

The injury sued for in that case occurred on the Washington & Alexandria Railroad. The action was brought against the Pennsylvania Railroad Company and four other companies, and the theory upon which the action was founded was, that all of the defendant companies were engaged as common carriers, in the transportation of passengers, persons and freight, upon and along the several lines of the railroads belonging to them, and along the line, among others, of the Alexandria & Washington Railroad Company, under an arrangement or contract for their common benefit, by which they were interested jointly in the running and management of these roads, and that through the negligence of the defendant companies the collision occurred which caused the injury complained of.

In referring to the facts shown in evidence in that case, the court said: "It is conceded, or sufficiently appears in the evidence, that the running and management of the road of the Alexandria & Washington Railroad Company were not within the scope of the ordinary powers of the Pennsylvania Railroad Company as a corporation of the State of Pennsylvania. To render the latter company responsible for what

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might take place on a railroad in another State some contract or arrangement to that effect must be made to appear."

After referring to the annual reports of the board of directors of the Pennsylvania Railroad Company to their stockholders, for 1884 and 1885, and what was shown thereby, the court proceeded to say: "It was also shown by said report that the Pennsylvania Railroad Company owned, on December 31, 1885, \$1,000,000 of the bonds of the Alexandria & Fredericksburg Railway Company, and \$2,000,000 of the bonds of the Baltimore & Potomac Railroad Company, and 60,852 shares of the Baltimore & Potomac Company's stock, and 217,819 shares of the stock of the Philadelphia, Wilmington & Baltimore Railroad Company."

There was also put in evidence in that case a railroad map showing a continuous line of railroad between Philadelphia and Quantico, with letters signifying that the roads embraced therein were the Philadelphia, Wilmington & Baltimore, the Baltimore & Potomac, the Alexandria & Washington, and the Alexandria & Fredericksburg Companies.

It was also proved, says the court, "that a ticket issued by the Pennsylvania Railroad Company was sold in Baltimore, at the office of the Northern Central Railroad Company, on account of the Alexandria & Fredericksburg Railway Company, and it was likewise proved that the Pennsylvania Railroad Company owned stock in the Alexandria & Washington and the Alexandria & Fredericksburg Railway Companies, and that some persons who were officers of the Pennsylvania Railroad Company were likewise officers of these companies. It was also shown that the employees of the Baltimore & Potomac, the Alexandria & Washington, and the Alexandria & Fredericksburg were paid from a pay-car, whose brakeman and conductor wore a blue uniform with silver buttons, which was said to be the uniform of the Pennsylvania Railroad Company.

"Newspaper advertisements were put in evidence, calling the attention of the traveling public to the great Pennsylvania Route to the Northwest and the Southwest, and it was shown that J. R. Wood was general passenger agent, and

Charles E. Pugh, general manager, of the Pennsylvania Railroad Company, stationed at Washington; and it likewise appeared that they occupied similar positions in the Philadelphia, Wilmington & Baltimore, the Baltimore & Pottomac, Alexandria & Washington, and the Alexandria & Fredericksburg Companies."

In conclusion, upon the evidence relating to the liability of the Pennsylvania Railroad Company, in that case, the court say: "That the Pennsylvania Railroad Company advertised that it ran trains, or connected with trains of other companies, so as to form through lines, without breaking bulk or transferring passengers, did not tend to show any contract or agreement between the companies to share profits and losses. Nor was there evidence, in the present case, that there was any actual participation by the Pennsylvania Railroad Company in the earnings of the other companies which used the road between the cities of Alexandria and Washington. On the contrary, the evidence affirmatively showed that such earnings, including what was paid by the United States for the transportation of mails, were divided between the other companies, and went, none of them, to the Pennsylvania Railroad Company."

That case would appear so entirely to cover and conclude the present, as to leave no room for question or doubt on the facts of the present case.

It is, however, very earnestly argued for the plaintiff that the recent case of the *Chesapeake & Ohio R.R. Co. v. Howard*, 178 U. S. 153, affords strong support to the case of the plaintiff; and though the facts of that case are different, yet, it is contended the principle upon which that case was decided, has direct application here. But we do not so read that case. That was an action to recover for personal injuries, and the action was against the railroad company that issued the ticket for safe passage. There was no question as to the identity of the company that made the contract for carriage, but whether the defendant company was liable for the negligence of the agents and servants of the particular road upon which the accident occurred, was the question.

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In that case, the female plaintiff, while traveling from Louisville, Kentucky, to Washington City, on a through ticket, in a car of the defendant company, and on a train conducted by its agents, the car was derailed and thrown down a bank, and the plaintiff was seriously injured; and it was for this injury that she sued the company upon whose ticket she was traveling. The defense set up by the company was, that at the time of the occurrence of the accident, the train was managed by a Connecticut company to whom the road had been leased, and that the defendant was not liable for the consequences of the accident. But this court held, and so held the Supreme Court of the United States, that the fact of the lease of the road would not bar a recovery; that if, notwithstanding the execution of the lease, the defendant company, through its agents and servants, managed and conducted and controlled the train to which the accident happened, it would be responsible for the accident; and that the facts in relation to the management and control of the train were properly left to the jury, and their finding should not be disturbed.

The case in fact has little or no bearing upon the case under consideration. There is certainly nothing in the case that qualifies in any respect the decision in the case of the *Pennsylvania Railroad Company v. Jones*, *supra*, and that case we regard as entirely controlling the present.

It follows, therefore, that the judgment of the court below must be affirmed; and it is so ordered.

Judgment affirmed.

A writ of error to the Supreme Court of the United States was prayed and allowed.

BREWER v. SLATER.

BILLS AND NOTES; BONA FIDE PURCHASERS; MORTGAGE AND DEED OF TRUST NOTES; TRUSTEES.

1. Circumstances of suspicion only are insufficient to charge the holder of a promissory note for value with knowledge of its invalidity as between the maker and payee.
2. While reference on the face of a promissory note to the fact that it is secured by mortgage, may be sufficient to call attention to any restraining or qualifying words of the mortgage having special relation to the note, and affecting its negotiability, and require that the two be read and interpreted together, the negotiability of the note, in the absence of such words, is not affected; and the debt evidenced by the note gives character to the mortgage and protects it from the equities between mortgagor and mortgagee on behalf of a *bona fide* holder of the note for value.
3. The trustee in a deed of trust may become the purchaser and *bona fide* holder for value of the promissory note secured by the deed of trust, his duty as trustee concerning only the security and not the debt; and the rule that forbids his purchasing the trust property has no application to his acquisition of the note in a transaction with its owner, otherwise free from taint.

No. 1082. Submitted January 23, 1901, Decided March 7, 1901.

HEARING on an appeal by the complainant from a decree of the Supreme Court of the District of Columbia dismissing a bill in equity for the cancellation and surrender of a contract, promissory note and deed of trust. *Affirmed.*

The COURT in its opinion stated the case as follows:

The original bill in this case was filed by William H. Brewer, May, 1899, to obtain cancellation, upon charges of fraud and want of consideration, of a contract between him and Robert Y. Slater, a promissory note founded on the same, and a deed of trust given by him to secure said note. By the terms of the contract, made June 3, 1898, Robert Y.

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Slater undertook to relieve certain lots belonging to complainant in the city of Washington from the general and special taxes that had been assessed against the same during previous years, and to pay all costs, expenses and attorney's fees incurred in so doing. In consideration of said undertaking, the complainant agreed to execute his note for \$450 payable to the order of said Slater three years after date with 6 per cent. interest, semi-annually, and to secure the same by trust deed upon said lots. The said Slater further agreed, in the event of his failure to settle or cancel said taxes, which amounted to \$900, "to refund to said William H. Brewer \$450 and interest that may have been paid thereon." The note was made and delivered on the same day, and the trust deed executed as stipulated. On the margin of the note the following words were written or printed: "Secured by deed of trust on a part of lots 127 and 128, square 244, Malcolm Hufty and John G. Slater, trustees." The deed of trust was in the ordinary form, providing for the possession of the grantor until default, and for the sale of the lots by the trustees in case of such default, at public auction upon such notice as they might deem advantageous and proper. Hufty was made a party as trustee; but by subsequent amendment, Laura V. Dann was made a party defendant, and the averment made that she and Hufty claimed to hold the said note as assignees of Slater. Their answers denied knowledge of the fraud alleged in the transaction between Brewer and Slater, and set out the facts through which they had become holders of the notes, as indorsees of Slater, for value and before maturity.

There is no substantial conflict in the evidence relating to these defenses. It appears that on August 25, 1898, Slater applied to Hufty for a loan of \$1,000, offering as collateral security therefor the note aforesaid, a like secured note of Frere and German for \$750, and what has been called the Gladmon tax sale certificate showing a purchase of certain property for the sum of \$39. Hufty reported the offer to Laura V. Dann, a client for whom he often made investments. She advanced \$1,000 to Slater, who executed

his note to her therefor, and indorsed and delivered the collateral security aforesaid. Slater's note was extended from time to time, and, upon final failure to pay, the sale of the collateral was threatened. Being unable to pay, Slater, in order to prevent the sale, offered to transfer all of his interest in the said collateral securities to Hufty if the latter would procure the surrender of his note. Hufty was at the time indebted to Mrs. Dann for a loan of \$600 for which she held his note, secured by the deposit of collateral securities of the aggregate face value of \$900. On March 15, 1899, by agreement with Mrs. Dann, Hufty received the Slater note from her and delivered it to Slater, who relinquished his interest in the collaterals to Hufty. The latter also obtained the surrender of his \$600 note by Mrs. Dann, and executed to her a new note for \$1,600. This she accepted, retaining all of the collateral aforesaid as security for its payment. On July 1, 1899, Hufty paid Mrs. Dann the sum of \$1,000, which was credited upon his note, and she delivered to him the "Gladmon certificate," which he sold for the sum of \$600. June 22, 1900, the bill was dismissed, without prejudice to the complainant's right of future suit against Robert Y. Slater alone, and from that decree this appeal has been prosecuted.

Mr. Chas. Cowles Tucker for the appellant:

1. The appellees Hufty and Dann were not, within the meaning of the commercial law, or law merchant, *bona fide* purchasers for value for a valuable consideration and without notice, and, as such, entitled to all the protection which that law accords them. When the note was first delivered by Slater as a part of the collateral to secure his note for \$1,000, it was delivered to Hufty as the attorney for Mrs. Dann. She, therefore, is chargeable with whatever notice, actual or constructive, he had of the infirmities of the paper. When, later, Hufty assumed Slater's debt, and became the owner of the collaterals, including the Brewer note, subject to the claims of his client Mrs. Dann, the relation of attorney

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and client which had existed between them was not changed, but the relation of debtor and creditor was superadded. In the whole transaction Hufty acted as attorney or agent for Mrs. Dann, and we therefore submit that with respect to this note, they stand in each other's shoes. Mrs. Dann can claim no greater rights than Hufty, and he can claim no greater right than she.

2. The note in question is not, strictly speaking, commercial or business paper. Such paper is designed to pass from hand to hand, during its short life of thirty, sixty, ninety days, and to perform the same functions as bank notes and money. The interests of commerce and trade demand that parties taking it in exchange should have the high degree of protection which the law merchant affords them. The note in suit is paper of essentially different character. It was payable three years after date and showed upon its face that it was secured by a deed of trust to two trustees, contemporaneously made.

"The note and mortgage are to be construed together as if they were parts of one instrument, when they were to be made at the same time, and in relation to the same subject, as parts of one transaction constituting one contract. They explain each other so far as the indebtedness is concerned. * * * The mortgage may describe the debt as well, and thus may qualify the terms of the note." 1 Jones on Mortgages, Sec. 71. In *Strong v. Jackson*, 123 Mass. 60, the court say: "It is quite clear that a note payable five years after date, with a memorandum upon it that it is secured by mortgage upon real estate, is not what, by men of business, is usually denominated commercial or business paper; and we think there is a material distinction between securities of this kind and strictly mercantile paper, and that such paper as this may be subject to equities when strictly mercantile paper would not be; not that the rule of law is different, but what would attract no attention in relation to purely business paper should attract attention in paper of this description." In *Crosby v. Grant*, 36 N. H. 273, the court say: "The general proposition that the note,

in order that it may be protected against equities as between prior parties, must be taken in the usual course of business, is undoubtedly correct. If it be received on any other footing than as a *bona fide* purchase by the holder, independent of any previous connection *with it or with any of the parties upon it*, so that he does not take it as such paper ordinarily passes from the holder to the indorser upon a purchase and sale of the security, then he takes it not in the usual course of business, and consequently subject to the same defenses as if negotiated after dishonor."

3. Hufty, the trustee in the deed of trust, took the note with knowledge of his trusteeship — knowing of his connection with the maker of the note — knowing that the latter was his *cestui que trust* to whom he owed a high duty as trustee. Can it be said that he took the note as notes ordinarily pass by purchase and sale? His duty as trustee prevented him from so taking it. 26 A. & E. Encyc. of Law (1st ed.) p. 878, citing *Long v. Long*, 79 Mo. 644; *Gimbel v. Pignero*, 62 Mo. 240; *In re Mayfield*, 17 Mo. App. 684; *Jones Mortg.* (4th ed.) 1771.

4. It is not necessary for the purpose of appellant's case for him to contend that the fact that the trustee in a deed of trust is the owner of the debt secured will invalidate the power of sale. It has been held that it will not; because the effect of such ownership is merely to render his position that of a mortgagee with power of sale. See *Cassady v. Wallace*, 102 Mo. 575; *Foster v. Latham*, 21 Ill. App. 165, and *Darst v. Gale*, 95 Ill. 513; *Carey v. Brown*, 62 Cal. 373. But this is the extent to which these cases go; and in one of them Lord Eldon is quoted as saying that the making of the beneficiary in a mortgage a trustee to sell, is by no means a prudent thing to do; while in another, such an arrangement is mentioned as a circumstance imposing upon the trustee the burden of establishing clearly that the transaction is free of all suspicion. The question here is, not whether the power of sale in the deed of trust is invalid, or whether the trustee Hufty, by acquiring the note from one of his *cestuis que trust*, the payee of the note, is precluded from enforcing it against

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his other *cestui que trust*, the maker, but it is whether, when he thus acquires the note, and makes himself the mortgagee with power to sell, he does not step into the shoes of the payee of the note, Slater, and take it subject to equities existing between the latter and the maker, Brewer. If no such equities existed; if the note had been given for value; if it had not been fraudulently obtained, Hufty could recover on it as against the maker, or he could foreclose the deed of trust, although he could not purchase the property himself upon the sale. *Easton v. German-American Bank*, 127 U. S. 532. Hufty's position as trustee was to hold himself aloof from the transaction between his two *cestuis que trust*, Brewer and Slater; to take no part in it by which he would profit by his position as trustee, except in the matter of commissions as fixed by the deed of trust; to permit his *cestui que trust*, Brewer, to continue in the possession of the property under certain conditions; to sell the property, in default of payment of the debt secured, *upon such terms and after such public advertisement as he and his co-trustee might in their discretion deem advantageous and proper*. Hufty's trusteeship under this deed of trust, of itself, renders it impossible for a court of equity to invoke in his favor the strict rules of the law merchant which accord such ample protection to *bona fide* purchasers for value of mercantile or business paper in the open market. And when we add to the circumstance of his being a trustee, the many circumstances disclosed by the testimony, showing his intimacy in business transactions with Robert Y. Slater; the fact that he had acted and was acting for him as his attorney; the fact that Slater at the time of this transaction was a young man of only twenty-one years of age, with no money or property that would indicate that he had acquired these collaterals which Hufty took from him in a legitimate manner; the fact that the note was evidently signed by an illiterate and uneducated person, and the fact that Slater was not even asked by Hufty where he got the note, we have a case in which Hufty should not be allowed to successfully maintain in a court of equity the position of an innocent purchaser for value of this

note; especially when by so doing he is placed in the position of being able to make a large profit out of the fraud which Slater perpetrated upon Brewer.

5. So far, it has been assumed, for the purpose of argument, that Hufty gave value for the deed of trust note in controversy. As a matter of fact what did he give? He claims to have acquired the Brewer note from Slater, together with the Frere and German note and the Gladmon certificate, and to have paid for them by giving his note to Mrs. Dann in place of Slater's note, which was returned to him. It may be said that he has paid Mrs. Dann \$1,000, but \$600 of that he owed her, having borrowed that sum personally from her; and the difference between that sum and the \$1,000 paid her, namely, \$400, he paid out of the proceeds of the sale of the Gladmon certificate, for which he received \$600 in cash, which leaves him already \$200 ahead. But, it will be said, he still owes Mrs. Dann \$600. If he does, there is the Frere and German note to pay it with, or this court can readily provide for its payment by directing the sale of the \$750 note secured by deed of trust, and so prevent Brewer from suffering the consequences of the fraud perpetrated upon him. All of the parties are before the court and we submit it is strictly within the province of this court, as a court of equity, to adjust their several rights.

Mr. Mason N. Richardson for the appellees, Malcolm Hufty and Laura V. Dann.

There was no appearance for the other appellees.

Mr. Justice SHEPARD delivered the opinion of the Court:

There is no occasion to discuss the evidence offered to show that the execution of the contract, note and trust deed was obtained by Slater through fraud practiced upon complainant. Robert Y. Slater testified as a witness, but it does not appear from the record that he answered the bill; and there has been no appearance for him on this appeal. As-

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suming that the complainant is entitled to relief as against Slater, the question for determination is, whether Mrs. Dann and Hufty are to be regarded as *bona fide* holders of the complainant's note through their transactions with Slater.

The proof shows that Mrs. Dann came into the possession of the note shortly after its utterance and before any real suspicion seems to have arisen in the mind of Brewer that he had been imposed upon by Slater. She paid a valuable consideration, and it is not contended that she had actual knowledge of any fact sufficient to lead her to doubt the consideration of the note, or the fairness of the means by which Slater had obtained it. Nor does it appear that Hufty had actual knowledge of the facts of the transaction, or that there was any claim of imposition therein affecting the obligation of the note, either when he effected the loan by Mrs. Dann, or at the time when he himself became the owner of the note subject to the lien of Mrs. Dann. An attempt was made, however, to show such relations between Hufty and Slater, commencing before the execution of the Brewer note and existing throughout the later transactions, as warrant the inference of Hufty's knowledge of the fraud practiced upon Brewer and the consequent defect in his note. And the knowledge thus inferred, it is contended, must be imputed to Mrs. Dann because Hufty was her attorney and agent in the transaction with Slater. From the evidence relied on, it appears that Slater and Hufty occupied offices on the same floor and very near each other; that they were both engaged, more or less, in dealing in tax titles, certificates of sale, and removal of tax liens, and so forth. There was evidence tending to show some intimacy between them, and that they were both interested in the tax sales of the property of the Moxley estate; at any rate, Hufty represented Slater's interest in the same. Slater was not an attorney; Hufty was, and frequently represented Slater, though not in all of his cases. It does not appear that he represented or advised Slater in his transactions with Brewer, and there is nothing in that transaction to suggest special need of legal assistance. It was in the ordinary course of Slater's own business

which, it would seem, he was thoroughly competent to conduct through that stage. None of the papers executed by Brewer was written by Hufty and it is not pretended that he was present at any interview between the contracting parties. It is true that he was a co-trustee with John G. Slater, the father of Robert Y. Slater, in the deed of trust; but it was not made to appear that he had been informed of that intention beforehand and had consented thereto, or that he knew it afterward before he saw the indorsement on the margin of the note in the course of the negotiation of the loan of Mrs. Dann to Slater.

The position of the holder of negotiable paper for value is a strong one, and he cannot be displaced by mere circumstances of suspicion growing out of the unpopular business or even the ill reputation of his assignor. *Swift v. Smith*, 102 U. S. 442, 444; *Goodman v. Simonds*, 20 How. 343; *Goetz v. Bank*, 119 U. S. 551, 561; *King v. Doane*, 139 U. S. 166, 173.

Hufty not only denied in his answer but also in his testimony as a witness, during the taking of which he was subjected to a searching cross-examination without substantial effect, that he had any knowledge of the transactions between Brewer and Slater, save as shown on the face of the note and the trust deed, or that he had heard anything to cast suspicion upon their fairness before his interest had been acquired. There is nothing to cast the shadow of a doubt upon the testimony of Mrs. Dann that she lent Slater \$1,000 upon Hufty's advice and received the note as collateral security in perfect good faith. The fact that the note was first dealt with on her behalf by Hufty is a circumstance tending in some degree, though slight, to corroborate his claim of innocence in the transaction.

He was risking the money of a client whom it was his professional duty to safeguard with every reasonable precaution; and, moreover, her ownership of money, and her implicit confidence in him, shown not only in her prompt action upon his advice, but also in her extension of credit to him individually, added strong motives of private interest to pro-

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fessional obligation. We are, therefore, constrained to hold that the circumstances relied on do not point with sufficient certainty to Hufty's knowledge of the defects affecting the note as between Brewer and Slater, either at the time of the delivery to him as collateral security for Mrs. Dann or later when assigned to him in complete ownership. Whilst tending to create suspicion, they fall short of the required proof.

The final contention on behalf of the appellants involves two propositions: (1) That the note, referring on its face to the trust deed, must be read therewith, and the two must be construed together as one instrument; (2) that, so read, Hufty, as express trustee for both parties, could not become an ordinary purchaser of the negotiable note made by one of his *cestuis que trust* and payable to the other, and must, therefore, be held as standing in the shoes of his indorser subject to all of the equities existing between him and the maker.

It requires no citation of authority to show that a negotiable note secured by mortgage upon land loses none of its attributes by reason of that fact. The mortgage is an incident of the debt and passes with its assignment. The debt evidenced by the note gives character to the mortgage and protects it from the equities between mortgagor and mortgagee on behalf of the *bona fide* holder of the note for value. The mortgage, with or without power of sale, detracts nothing from the quality of the debt which it secures, though it may add commercial value through its lien. That the note may recite or show upon its margin, which seems the general custom, that it is secured by mortgage or other lien, cannot affect the doctrine stated.

It may be true that such reference would be sufficient to call attention to any restraining or qualifying words of the mortgage, having special relation to the note and affecting its negotiability, and require the two to be read and interpreted together. But whether true or not is of no moment here, because there are no words in this trust deed that have the remotest tendency in that direction. As the undoubted power exists to constitute the mortgagee himself a trustee

to sell the security for his own benefit, and his assignee would take the note unaffected by equities that might bind him, we cannot perceive the force of the argument that would deprive an independent trustee in such an instrument of the power to purchase the secured note, or limit his right to claim all the protection afforded a *bona fide* holder for value.

As trustee for sale of the security, he is charged with no custody or control of the evidence of the debt. His duty concerns the security alone and is simply to sell in accordance with the terms of the trust when called upon by the holder of the debt after default made in payment. The salutary rule that forbids his purchasing the property conveyed to him in trust to sell for the benefit of others has no application to his acquisition of the note in a transaction with its owner, otherwise free from taint.

Whether, having purchased such a note, he may subsequently act as trustee and sell the property, involves another and a different question that does not now occur.

The decree appealed from is without error, and will be affirmed, with costs.

Affirmed.

MACKALL v. MITCHELL.

EJECTMENT; COLOR OF TITLE; POSSESSORY TITLE.

1. Where the defendant in ejectment relies not only upon a good record title, but also upon a possessory title, a marshal's deed and tax deeds to one under whom he claims, are admissible in evidence as constituting color of title, whether they are void or not.
2. A small triangular parcel of land left for access to the main door of a building, and necessary for such access, is to be regarded, in contemplation of law, as covered by the building, and twenty years' adverse possession of the building and use of the parcel of land as a means of access thereto, will be sufficient to give a good possessory title to such parcel, especially where the plaintiff in ejectment seeking to recover such parcel of land, planned and erected the building and made the triangle the only place of access to the principal, if not only, door of the building opening on the street.

No. 1085. Submitted February 14, 1901. Decided March 7, 1901.

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HEARING on an appeal by the plaintiff from a judgment of the Supreme Court of the District of Columbia upon the verdict of a jury directed by the court in an action of ejectment.

Affirmed.

The COURT in its opinion stated the case as follows:

This is a suit in ejectment instituted by the appellant, Brooke Mackall, as plaintiff, in the Supreme Court of the District to recover the possession of a small triangular piece of land in the city of Washington at the southwest corner of Fourteenth street and New York avenue, constituting the acute angle of Lot No. 7, in Square 223, and containing less than fifty square feet of ground. This piece of land was not built upon on account of its angularity when the building was constructed on the lot which occupied it at the time this suit was instituted, and had occupied it for about twenty-five years before that time, the main entrance of which opened upon it. The piece in question was apparently a part of the sidewalk in front of the building, and over it and upon it ingress to the building and egress therefrom were had, and it was the principal place of ingress and egress.

At the trial of the issue between the parties as to the ownership of the land, the plaintiff proved what seems to be conceded to be a complete record title in himself to the whole of Lot 7, in Square 223, omitting all the subsequent proceedings under which the defendant claimed; and he further proved that on June 1, 1896, the defendant was in possession as tenant of the premises under a lease to him from the heirs or representatives of one Alfred Richards. It is assumed that this possession continued at the time of the institution of the suit, January 29, 1897, although there is no proof of the fact in the record now before us.

The plaintiff seems to have been in possession of Lot 7 in the year 1864, for in that year he commenced to erect a building on it; and it is claimed on behalf of the defendant, William Ray Mitchell, that he even then held an unrecorded

conveyance of it to himself in fee-simple, although the title now exhibited by him finds its record completion in the year 1880 by a deed from his father, who was the previous record owner.

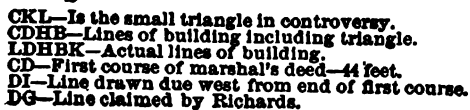
On behalf of the defendant the title given in evidence was that of Alfred Richards, who has been mentioned; and the contest between the parties is, in fact, as to the validity of that title. Indeed, this suit is only the last of a long series of suits between Mackall and Richards extending from the year 1870 down to the present time, all involving the question of the ownership of parts or of the whole of this Lot 7, of which, as we have stated, only a very small fragment is in controversy in this suit.

The litigation appears to have begun with the filing of mechanics' liens by Alfred Richards and others against the property for materials furnished by them for the construction of the building stated to have been commenced thereon by Mackall in 1864. Three suits at law resulted, it appearing to have been the practice at that time to enforce such liens by suits at law instead of bill in equity, and judgments therein were had against Mackall, upon which writs of execution were issued and placed in the hands of the marshal. The evidence on the part of the defendant began with the offer of the records of these several suits, to which there was no objection.

The marshal advertised and sold under the writs, and executed a deed of conveyance to Alfred Richards, the purchaser. But what he advertised, or what he sold, or what he conveyed, appears never to have been definitely ascertained; and it is this indefiniteness which gave rise to all the subsequent litigation. The deed purported to convey "that part of lot numbered seven, in square numbered two hundred and twenty-three, beginning for the same at the northeast corner of said square, and running thence south forty-four feet, thence westerly to the west end of said lot, thence in a northerly direction with the west line thereof to the northern line of said lot, thence with said northern line to the place of beginning." Lot 7 is an irregular lot,

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ent from a diagram



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he and his representatives have continued to hold to the present time.

Next there were offered in evidence for the defense, merely to show color of title in Richards, two tax deeds from the District of Columbia to Alfred Richards and T. A. Richards, whereby, on account of default in the payment of taxes due to the District for the year 1872 and for several years prior thereto, the District of Columbia conveyed the whole of Lot 7 to the grantees. These tax deeds were followed by a deed of his interest thereunder executed by T. A. Richards to Alfred Richards. The tax deeds were executed in 1874, and promptly recorded. Exception was reserved by the plaintiff to the admission of all three of these deeds, on the ground that they were absolutely void, there being, as claimed, no preliminary evidence to show that the prerequisites of the law as to publication, notice, etc., had been complied with.

Next there was offered and admitted without objection a quitclaim deed from Alfred Richards to Brooke Mackall, under date of November 30, 1887, apparently during a temporary lull in the litigation, whereby the former released to the latter all of Lot 7, except that portion upon which the building stood, which was then known as the Palace market, and except, also, that triangular piece now in controversy. The purpose of this deed was to enable Mackall to effect a loan upon the property.

The next piece of evidence was the record of two subdivisions made by Richards of part of Lot 7, one on November 26, 1877, designated by him as Lot 12, which appears on the foregoing diagram as contained between the lines A C D A, and the other on March 12, 1888, designated by him as Lot 13, which appears on the diagram as contained within the lines B C D H B. Both of these subdivision lots contained and included the triangle now in controversy.

There were then introduced the records of various suits in equity and at common law previously had between the parties and wherein this Lot 7 was involved. These suits in their chronological order are as follows:

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Statement of the Case.

(1) Equity cause No. 23731 on the docket of the Supreme Court of the District of Columbia, instituted by Richards against Mackall and others, which was a judgment creditor's bill to sell all of Lot 7, except the part covered by the marshal's deed, and specifically stated to be the part south of the line DG on the diagram, in order to satisfy the residue of the judgments obtained by Richards and others in connection with their mechanics' liens and which had not been satisfied by the marshal's sale. Mackall, in his answer, denied that he had any ownership in the premises; and in the course of the proceedings he testified as a witness that Richards had used the triangle now in controversy with the building ever since his purchase from the marshal in 1870, and had claimed the whole of Lot 12, which included this triangle, as already stated.

The Special Term of the Supreme Court of the District adjudged, on May 1, 1873, that the present appellant was the owner of the property, and decreed a sale in accordance with the prayer of the bill; and this decree was affirmed by the General Term and by the Supreme Court of the United States on appeal. See *Mackall v. Richards*, 116 U. S. 46. The cause was thereupon remanded for the execution of the decree by the Supreme Court of the District. Under this decree a sale was made and reported, to which Mackall filed exceptions on the ground that the property sold had not been sufficiently described. The exceptions were sustained, and the sale was vacated. Steps were then taken by the equity court to fix the boundaries of the property, and on December 11, 1879, a decree was entered at the Special Term directing sale of the part of Lot 7 south of the line DG, without any determination of the lines of the marshal's sale. This was affirmed by the General Term; but on appeal to the Supreme Court of the United States, that tribunal reversed the decree of the lower court, and remanded the cause, "with directions to the court below to set aside the decree from which this appeal is prosecuted, and to order the sale, in satisfaction of the complainant's demands, and in such mode as may be consistent with the practice of the

court and with law, of Lot 7 outside of the part upon which the building known as the Palace market stands." 112 U. S. 369, 377.

The Supreme Court of the District thereupon entered a decree directing a sale of all of Lot 7 outside of the part on which the Palace market stood, following the language of the mandate of the Supreme Court of the United States. But the cause was satisfied, and, consequently, no sale was ever had.

It may be stated that the original bill of complaint in this case perpetuated and brought into the cause the indefiniteness of the marshal's deed, by praying for the sale of all of Lot 7 which remained "after taking or carving out therefrom the aforesaid piece or part thereof so as aforesaid taken, sold, and conveyed by the marshal of the District of Columbia to Alfred Richards," etc.; and, consequently, it became necessary in that suit to determine the limits of the marshal's deed. Upon that question the Supreme Court of the United States expressed the opinion "that the record fails to show that any part of Lot 7, outside of the piece upon which the building at the northeast corner of the lot stands, was sold or conveyed by the marshal to Richards." 112 U. S. 376.

(2) Equity cause No. 8118 on the docket of the Supreme Court of the District, instituted on April 11, 1882, by Mackall against Richards for the purpose of vacating the marshal's sale of June 13, 1870, the deed thereunder of October 7, 1870, and all the subsequent conveyances dependent thereon, and for an account of rents and profits. This bill was dismissed by the Special Term; but the General Term reversed the decree, and held the marshal's sale and the deed thereunder void on account of the uncertainty in the description of the property. 3 Mackey, 271. The Supreme Court of the United States, upon appeal by Richards, reversed the decree of the General Term, held that Mackall was guilty of gross laches in the prosecution of his suit, and remanded the cause with directions to dismiss the bill. 124 U. S. 183. The bill was accordingly dismissed.

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(3) Equity cause No. 9782 on the docket of the Supreme Court of the District, instituted on January 20, 1886, by Mackall against Richards, to have the part of Lot 7 in the possession of Richards sold with the remainder of the property under the decree in Equity cause No. 2373, already mentioned. This bill was dismissed in the Special Term, and no further proceedings thereon were had.

(4) Cause No. 29286 at law on the docket of the Supreme Court of the District on January 10, 1889, by Mackall against Richards, for the recovery of a portion of the taxes paid by Mackall on the whole lot for the years 1878, 1879, 1880, 1881, 1882, 1883, 1884, second half of 1885, 1886, and 1887, in which suit it was alleged that Richards was in possession of the building. It does not appear from the record before us what the result was of this suit, nor is it important.

It was agreed by the parties in this connection that the taxes on Sublot 12, which has been mentioned, for the years from 1878 to 1884, both inclusive, and for the first half of the year 1885, had been paid by Richards, and also all the taxes assessed against the Sublot 13; and that the taxes for the whole of Lot 7 for the years 1873 to 1877, both included, second half of 1885, 1886, and 1887, had been paid by Mackall, on November 30, 1887.

Alfred Richards having died before the institution of the present suit, his will was then offered in evidence on behalf of the defendant. It devised the property in controversy as part of his general estate to trustees, who leased to the defendant Mitchell.

The testimony was also introduced of various tenants of the property, the substance of whose testimony was to show continued possession and occupation of the property by them as tenants of Richards or of his estate from May of 1876 to the time of the institution of the suit (January 29, 1897).

After some testimony in rebuttal not deemed important to be stated here, the plaintiff moved for an instruction to the jury to return a verdict in his favor on the ground that the decision of the Supreme Court of the United States in

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Equity cause No. 2373, which has been mentioned, was *res judicata*, or an adjudication of his right in the premises, which is conclusive and binding upon the parties, and that there had been no adverse possession of the property since the rendition of that decree of the Supreme Court (November 24, 1884); but this request was refused, and exception was taken. The defendant then requested an instruction to the jury upon the whole cause to return a verdict for the defendant; and the request was granted. To this also the plaintiff excepted.

Verdict was accordingly rendered for the defendant, and judgment entered thereon, from which the plaintiff has prosecuted the present appeal.

Mr. D. W. Baker and Mr. John C. Gittings for the appellant:

1. It was an error to admit the marshal's deed to Richards in evidence, as said deed is void and on its face conveys nothing, and only becomes intelligent in the light of the opinion of the Supreme Court of the United States in Equity cause 2373 (112 U. S. 369), and it is a matter of no difference whether the appellee offered the deed to prove title, or only for the purpose of showing color of title. The record shows that at the time the marshal's sale took place the legal title to Lot 7 in Square 223 was not in appellant, but in his father, Brooke Mackall, Sr. Therefore, the marshal's deed to Richards is worthless and void.

2. The admitting of the tax deeds into evidence to show color of title was unquestionably error; the authorities are clear in this jurisdiction that a tax title cannot be shown by the offer of a tax deed, without first showing a compliance with all the necessary requisites. *King v. District of Columbia*, McArthur & Mackey, 36; *Beale v. Brown*, 6 Mackey, 574. And an offer of the deed to prove *color of title* is subject to the same objection, as the deed is void on its face, as it fails to cite that these requirements have been complied with, which are a prerequisite to the officer authorized to give such

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a deed. It is the general rule of law that a paper title to give color must *prima facie* appear to be a good title. *Hill v. Law*, 102 U. S. 466; *Veal v. Robinson*, 70 Ga. 816; *Birnal v. Gleim*, 33 Cal. 676; *Jackson v. Frost*, 5 Cow. (N. Y.) 351; *Livingston v. Peru Iron Co.*, 9 Wend. (N. Y.) 511; *Redfield v. Parks*, 132 U. S. 251; *Shoat v. Walker*, 6 Kan. 65; *Keef v. Bramhall*, 3 Mackey, 551.

3. The court below, in refusing to grant appellant's prayer, based on the theory that the final decree in Equity cause 2373 was *res judicata* in his favor, erred. The general principle that a right, question, or fact, distinctly put in issue, and directly determined by a court of competent jurisdiction, cannot be disputed in a subsequent suit between the same parties or their privies, seems to be well-settled law. *Cummings v. Baker*, 16 App. D. C. 1. The right to examine the court's decision to ascertain what questions were actually adjudicated thereby has been repeatedly upheld both by the Supreme Court of the United States and this court. *Cummings v. Baker*, Id.; *Phelps v. Harris*, 101 U. S. 370. And we contend that from the language of Mr. Justice Harlan in Equity cause 2373 (112 U. S. 377), appellant's title to this triangle, the subject of dispute here, is settled, as the record shows the equity cause was satisfied, and that the trustees, while authorized to sell, never sold the property; therefore, so far as Richards or his privies are concerned, the question is *res judicata*, and the prayer requested of the court below was proper and should have been granted.

4. We have shown that Equity cause 2373 disposed of any right appellees could claim by virtue of the marshal's deed to Richards; and the record is absolutely barren of evidence to support claim of color of title under tax deeds; and (without taking into consideration that the court erred in admitting the tax deeds in evidence), we respectfully submit, what is there in the record upon which the defendant's prayer could have been predicated? Certainly not upon the theory that Equity cause 8118 was *res judicata* against appellant, as the opinion of Mr. Justice Harlan emphatically states, in the decision of the Supreme Court of the United States, that that

cause was dismissed on the sole ground of *laches*. *Richards v. Mackall*, 124 U. S. 173. That a bill in equity, being dismissed on the ground of *laches*, does not adjudicate the merits, is a principle well settled. 2 Pom. Eq., Sec. 817; *Cummings v. Baker*, *supra*.

Mr. B. F. Leighton and *Mr. W. C. Prentiss* for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

The assignments of error are three in number, and are to the effect: (1) That it was error in the trial court to admit in evidence the marshal's deed and the several tax deeds which have been mentioned; (2) that the jury should have been instructed to render a verdict for the plaintiff; (3) that the jury should not have been instructed to render a verdict for the defendant. The second and third of these, of course, are the counterparts of each other; and both raise simply the question of the validity of the Richards claim of title to the property in controversy.

1. With reference to the first assignment, we think that there was no error in the action of the trial court in the admission either of the marshal's deed or of the tax deeds in evidence. It is not correct to say that the marshal's deed is upon its face null and void. The utmost that could be said of it is that, on account of its defective description of the property sought to be conveyed, it should be regarded as invalid. But none of the decisions which have been cited go so far as to hold that it is even invalid. It purports to convey a part of Lot 7, but it fails to define distinctly what part it is. The grantee, however, went into possession of the building under it; and the tendency of subsequent decision on the subject was plainly to hold that for the building and the part of the lot occupied thereby the conveyance might be regarded as good. But, whether the conveyance was valid or not, it was clearly admissible as the foundation of a possessory title; and the defendant here relies, not

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alone on a good record title, but on a possessory title as well. In the view, however, which we take of this case, it is unimportant whether this deed was properly admitted in evidence.

With regard to the two tax deeds, which were offered in evidence only to show color of title, the objection to them is clearly untenable. Richards was in possession of part of Lot 7 under claim of title. It is conceded that this claim covered the building and the part of the lot actually inclosed within the outer edge of its walls. Whether it included more would depend upon the title that was set up, whether that title was in itself valid or invalid. The tax deeds covered the whole of Lot 7, and consequently the claim of title would be construed to extend to the whole lot, and the occupant would be entitled to constructive possession of the whole lot. When he quitclaimed part of the lot to the appellant, as he did, the constructive possession under the tax deeds would extend to all the remainder; and it might well be that, by the acceptance of such a quitclaim deed under the circumstances, the appellant here should be held as admitting the validity of the adverse claim to the residue of the property, and possibly as estopped from contesting it.

These tax deeds undoubtedly constituted color of title to the occupant in possession of the property and claiming under them. It is objected that they were void. It is a grave mistake so to assume. If offered as links in a good record chain of title, it might have been improper to admit them without proof of the preliminary steps required to give them effect; but it does not necessarily follow that a tax deed should be regarded as void because it is a tax deed. But whether they are void or not is of no consequence here. They are offered simply as giving color of title; and it is a misapprehension of the question involved to argue that they are void. Color of title implies not a valid, but an invalid muniment of title. If the instrument were valid, it would give, not color of title, but a good and valid title. The two things are entirely different.

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We must, therefore, regard the first assignment of error as wholly untenable and without foundation.

2. The second and third assignments, as we have said, raise only the one question of the validity of the Richards title. In our opinion these assignments also are without merit.

On behalf of the appellant it is claimed that this question was decided in his favor by the adjudication of the Supreme Court of the United States in the case of *Mackall v. Richards*, 112 U. S. 369. On the other hand, on behalf of the appellee, it is claimed that this very same question was decided in favor of the appellee by the same court in the case of *Richards v. Mackall*, 124 U. S. 183. And both are argued to operate as estoppels to further litigation. The one decision was had in the suit heretofore designated as Equity cause No. 2373; and the other was had in Equity cause No. 8118. But we do not deem it necessary to determine here whether the adjudication in either case should be deemed to operate as an estoppel. We deem it sufficient to say, and from the record it plainly appears, that from the year 1870 to the time of the institution of this suit in 1897, a period of upwards of twenty-six years, Alfred Richards first, and his tenants and representatives afterwards were and remained in the undisturbed and uninterrupted possession of the building which has been mentioned under the name of the Palace market and of the part of Lot 7 covered by that building; and that this possession was never broken by any of the numerous suits to which reference has been made. Now, under the testimony in this cause and for the purpose of this cause we must regard the triangular pieces of land here in dispute as, in contemplation of law, covered by the building mentioned, and as a necessary part of such building. It was so designed by the appellant himself when he planned the building and made this triangle the only place of access to the principal, if not the only, door of the building opening on the street, and the only place of egress therefrom. The use of this triangle is necessary to the use of the building, and never was and is not now proper to be used for any

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other purpose. As well might it be argued that a building, in which a well or open space is left in the center for light and air, does not cover such open space, as that a space, left for access to the main door of the building and which is necessary for such access, is not part of the building, in contemplation of law. It seems to us that this position is too plain to require either elucidation of argument or citation of authorities.

If the appellant had by a voluntary conveyance transferred to Alfred Richards the part of Lot 7 covered by the building, together with the building thereon, undoubtedly he could not be heard, either at common law or in equity, to deny that his deed comprised the principal, perhaps the only mode of access to the building. And while in a case, in which the transfer has been made by the processes of law against the appellant's will, it might be proper to indulge for some purposes in less liberality of construction, certainly no such illiberality is to be sanctioned as would destroy or greatly impair the value of the transfer by the denial of the right of access to the property conveyed.

We are of opinion that the trial court did not err in its instruction to the jury to render a verdict for the defendant, and that it would have been error to direct a verdict for the plaintiff.

It follows that the judgment of the Supreme Court of the District of Columbia in the premises should be *affirmed, with costs. And it is so ordered.*

A motion for a rehearing by the appellant, filed March 21, 1901, was overruled April 12, 1901.



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GIBSON v. GIBSON.

DIVORCE; ADULTERY; APPELLATE PRACTICE.

1. The evidence in a suit for divorce reviewed and *held*, reversing the decree of the court below, sufficient to sustain the charge of adultery, made against the defendant.
2. A motion by the appellant to amend a decree of this court reversing a decree of the court below dismissing a bill for divorce, so as to direct the lower court, in entering a decree in favor of the complainant, to allow her arrearages of alimony to the date of the decree as well as permanent alimony and counsel fees, *overruled*.

No. 1086. Submitted February 7, 1901. Decided March 8, 1901.

HEARING on an appeal by the complainant from a decree of the Supreme Court of the District of Columbia, dismissing a bill in equity for a divorce. *Reversed.*

The facts are sufficiently stated in the opinion of the court:

Mr. Charles A. Douglass and *Mr. Joseph D. Wright* for the appellant.

Mr. Tracy L. Jeffords for the appellee.

Mr. Justice SHEPARD delivered the opinion of the Court:

This case is before us on appeal from a decree dismissing a bill for divorce filed by the appellant, Annie V. H. Gibson, against her husband, Charles A. Gibson, April 27, 1899.

The bill charged acts of adultery committed by the defendant with a party named therein during the summer and fall of 1898, and later.

It appears that in the spring of 1898, the defendant, who was then separated from his wife, took up his residence in a house on Thirteenth street, city of Washington, in com-

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pany with two unmarried male friends. The three kept house together and contributed equally to the expenses of living. They employed a colored woman as housekeeper and cook, who occupied a furnished room in the house. She was a widow between twenty-five and thirty years of age; and it is between her and the appellee that the criminal relations are alleged to have existed.

It appears that the complainant and defendant, through the efforts of mutual friends, were reconciled about March 19, 1898. On that date she came to live in the house, by consent also of defendant's associates, and the necessary changes of rooms were made to accommodate her. At that time she had no knowledge of any of the facts charged in her bill.

The reconciliation was of short duration. Becoming suspicious of the relations between the defendant and the housekeeper aforesaid, the complainant left the house about April 24, 1899, and three days thereafter commenced this suit.

There is no question of law involved in the decision of this case; it turns entirely upon the sufficiency of the evidence offered to sustain the charge of adultery. We cannot concur with the learned justice who presided at the hearing, in his view of the credibility and weight of this evidence. As our decision can, under the circumstances, have no particular value as a precedent, we will not review the evidence; for nothing less than some apparent importance, in the interest of justice, would justify spreading its details upon the pages of an opinion.

Considering the ease with which such charges can sometimes be made against an innocent man or woman, and trifles light as air can sometimes be converted by notice into potent circumstances, as well also as the duty owed to those whose reputations may be involved, though not actual parties to the suit, the whole evidence demands most careful scrutiny; and this it has received.

If conviction of the defendant's guilt depended upon the testimony of one of the leading witnesses for the complainant, we could readily concur with the court below in its

rejection; because, though not successfully impeached, doubt was cast upon his credibility. But it seems to have been overlooked that he was corroborated by the policeman, Martin, in respect of one material fact. This last witness also testified to an additional circumstance furnishing a strong ground for inference.

There was, besides, other independent evidence. The corner house, next to that occupied by the defendant and his companions, was separated from it by an open space about forty feet in width. Many windows of the rooms of defendant's house opened upon this space. A witness, disinterested and of good character, who had been for ten years in the service of the occupant of the corner house, testified to conduct witnessed by him on two occasions, the only reasonable inferences from which strongly sustain the truth of the charge of the bill. Moreover, the occupant of the corner house, and another resident of the vicinity, testified to the presence of several women, as well as men, in the house of defendant and his companions, on two distinct occasions, and to their drinking, noise, and general disorderly conduct. This testimony tended to identify defendant as present on at least one of these occasions and as guilty of one special act of disorderly conduct.

That the women present at such times consisted of the housekeeper and her friends is apparent from her own testimony given as a witness for the defendant. She said that she had permission to invite her friends, both male and female, to the house when the proprietors were absent, and occasionally exercised the privilege in the daytime and at night. She had permission to occupy the parlor and sitting-room and to use the piano. She said she only invited nice people, and while there was music and a little dancing, there was no disorderly conduct. Beer was kept in the house, to which she had free access, and she occasionally gave a glass to her friends. She denied, however, the presence of the defendant at any one of these meetings, as well, also, as the specific charges of misconduct at any time or place.

There are some other circumstances in evidence which

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tend to add some strength to the case of the complainant; but further comment is hardly necessary.

The decree appealed from must be reversed, with costs; and the cause remanded with direction to enter a decree in favor of the complainant. *Reversed.*

On the 30th day of March, 1901, *Mr. Douglass* and *Mr. Wright*, on behalf of the appellant, filed a motion to recall the mandate and amend the decree of this court.

This motion was on the 3d day of April, 1901, overruled, Mr. Justice SHEPARD delivering the opinion of the Court:

The appellant has filed a motion to amend the decree reversing this cause, to the end that the Supreme Court of the District shall be directed to allow her, as complainant below, arrearages of alimony up to the date of the decree by this court, as well as such further permanent alimony as may be meet and proper, including a reasonable counsel fee for her solicitors.

We see no reason for amending the decree. It appears that the court below had made an order for the payment of alimony *pendente lite* and a certain sum as attorney's fees. This was in arrears when the final decree dismissing the complainant's bill was rendered November 2, 1900, and an additional order was entered directing the defendant to pay the same to the amount of \$160.

The defendant raised no objection to this order and took no appeal therefrom. There is nothing in the record to show whether the alimony ordered to be paid was reasonable or oppressive. No question concerning alimony was raised on the argument or suggested in the brief of either party. The single question presented was whether the evidence submitted established the main charge of the bill?

Being satisfied of its sufficiency, the decree dismissing the bill was reversed, and the cause remanded for the entry of a decree thereon for the complainant.

The question of alimony was not considered, for the reasons

heretofore given, and was left, as it should have been, to the determination of the court below, at the time of entering the final decree granting the complainant her divorce, upon such facts as may then appear.

It is not necessary that the mandate be returned to this court, and the motion is *overruled*. *The clerk will certify this opinion and order to the Supreme Court of the District of Columbia.*

SAMAHA v. SAMAHA.

PLEADING AND PRACTICE; VOLUNTARY NONSUIT AFTER PLEA OF SET-OFF;
JUDGMENT, ENTRY OF.

1. The plaintiff in an action of assumpsit, after a plea of set-off by the defendant, cannot take a voluntary nonsuit so as to prevent the defendant from further prosecuting his plea; *construing* secs. 810 and 812, R. S. D. C., permitting mutual debts to be set off between the parties to an action and providing that "upon the trial of an issue of set-off, judgment shall be for the balance found due, whether to the plaintiff or defendant, with costs;" Chief Justice ALVEY *dissenting*.
2. The plaintiff, however, under such circumstances, may take a nonsuit as to his own demand, without prejudice to his right to renew his action thereon, and the judgment, if for the defendant, should be so entered as to protect the plaintiff in that right.

No. 1045. Submitted February 15, 1901. Decided March 8, 1901.

HEARING on an appeal by the plaintiff from a judgment of the Supreme Court of the District of Columbia, entered upon the verdict of a jury upon a plea of set-off after a motion by the plaintiff for leave to take a nonsuit had been denied.

Affirmed.

The acts are sufficiently stated in the opinion of the court.

Mr. Joseph A. Burkart for the appellant cited Secs. 810-812, R. S. D. C.; 16 A. & E. Encyc. of Law, p. 728; Water-

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man on Set-off, Sec. 749; 2 Elliott's Gen. Pr., Sec. 883; *Branham v. Brown*, 1 Bailey (S. C.), 262; *Fowler v. Lawson*, 15 Ark. 148; *Sewall v. Tarbox*, 30 Me. 27; *Tubbs v. Hall*, 12 Abb. Pr. N. S. 237; *R. R. Co. v. Ward*, 18 Barb. 595; *Wooster v. Burr*, 2 Wend. 295; *Nordmanser v. Hitchcock*, 40 Mo. 178; *Merchants' Bank v. Schulenberg*, 54 Mich. 49; *Theobald v. Colby*, 35 Me. 180; *Fink v. Bruhl*, 47 Mo. 173; *Cummings v. Pruden*, 11 Mass. 206; *Anderson v. Gregory*, 43 Conn. 64; *McCredy v. Fey*, 7 Watts (Pa.) 496; *Bank v. Coryell*, 9 W. & S. (Pa.) 15; *Buffington v. Quackenboss*, 5 Fla. 176; affirmed in *Clarke v. Wall*, 5 Fla. 496; *Bradshaw v. Earnshaw*, 11 App. D. C. 495.

Mr. J. H. Ralston and *Mr. F. L. Siddons* for the appellee cited 22 A. & E. Encyc. of Law, p. 442; *Van Alen v. Schermerhorn*, 14 How. Pr. (N. Y.) 287; *Rees v. Van Patten*, 13 How. Pr. (N. Y.) 258; *Bank v. Schulenberg*, 54 Mich. 49; 6 A. & E. Encyc. of Pl. & Pr. 830, 843, 848; *Holcomb v. Holcomb*, 23 Fed. Rep. 781; *R.R. Co. v. Rolling Mill Co.*, 109 U. S. 702; *Pullman Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138; *Atlantic Contracting Co. v. U. S.*, 35 Ct. of Claims, 30; *McKesson & Hunt v. Mindenhall et al.*, 64 N. C. 502 (504); *Wilkins v. Suttles*, 114 N. C. 550 (558); *Riley & White v. Carter*, 3 Humphr. 230; *Merchants' Bank v. Schulenberg*, 54 Mich. 49; *Thomas v. Hill, Admr.*, 3 Tex. 270; *Egery v. Power*, 5 Tex. 501; *Bradford v. Hamilton*, 7 Tex. 55; *Cunningham v. Wheatley*, 21 Tex. 184; *Adams v. Lewis*, 7 Martin N. S. (La.) 405; *Coxe v. Downs*, 9 Rob. (La.) 133; *Donovan v. Owen*, 10 La. Ann. 463; *Smith v. Amacker*, 15 La. Ann. 299; *Barrow v. Robichaux*, 15 La. 70; *United States v. Humason*, 8 Fed. Rep. 73.

Mr. Justice SHEPARD delivered the opinion of the Court:

The single question for determination on this appeal is, whether the plaintiff in an action of assumpsit can, after a plea of set-off by the defendant, take a voluntary nonsuit, carrying with it the defendant's right to further prosecute his plea.

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The appellant, Abraham Samaha, as plaintiff below, began the action against the appellee, Mansour Samaha, as defendant, to recover \$491.25, for money advanced, goods sold, work done, etc. Defendant replied with a plea of set-off in the sum of \$385.50. After the jury had been impaneled, the plaintiff moved for leave to take a nonsuit. This was refused and the case went to trial upon the defendant's plea, resulting in a judgment in his favor for the full amount of his counterclaim.

Section 810, R. S. D. C., permits mutual debts to be set-off between the parties to an action, and section 812 provides that: "Upon the trial of an issue upon a plea of set-off, judgment shall be for the balance found due, whether to the plaintiff or defendant, with costs."

It is unnecessary to recur to the limited scope of the common-law recoupment, the defects of which these sections of the statute were enacted to remedy. The right of the plaintiff to take a nonsuit in a common-law action, whether there was recoupment by the defendant or not, has always been admitted. But whether the right exists where the defendant has availed himself of the statutory privilege to plead in set-off and recover over against the plaintiff any balance found to be due him, has been much controverted, and the decisions are in hopeless conflict. These have been brought to our attention by the commendable diligence of the counsel on both sides, and not one seems to have escaped their research. Some of these might be explained by the peculiar provisions of their governing statutes, whilst others are founded on statutes substantially like our own. It would not serve any useful purpose to review these decisions, none of which have anything but persuasive force.

Those upon which the appellant relies proceed upon the view that the common-law right of nonsuit continues unless taken away by statute, either expressly or by necessary implication.

Notwithstanding the high authority of the learned courts enouncing that doctrine, we venture to express our preference for the liberal spirit of interpretation pervading the

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decisions of those in opposition. The object of the statute is remedial. It proceeds upon equitable principles to mitigate the rigor of the rule of law, by avoiding multiplicity of suits and the duplication of costs. To this end it permits the defendant not only to defend against the action of the plaintiff, and diminish his demand by way of recoupment or set-off, but also to become a party plaintiff, so to speak, by way of counterclaim, for any excess of his own demand. The defendant has thus, at his option, a right of cross-action something in the nature of the reconvention prevailing in some of our States whose systems of procedure are largely derived from the civil law. No hardship is imposed upon the plaintiff. He brings the defendant into court knowing that the latter has the right to plead over against him any proper subject of set-off and counterclaim. He has the same freedom of means and opportunity to controvert the demands of the counterclaim that he would have were it made the subject of a separate, independent action.

When the defendant has availed himself of the permission of the statute, and made his preparations to maintain his counterclaim upon the trial, it would be unjust and oppressive to permit the plaintiff to remain still in control of the case, with power to dismiss it as a whole at any time before verdict. It might happen that the cause would be delayed for a long period during which the defendant's entire demand would become barred by limitation, if compelled to be made the subject of a new and independent action.

A construction of the statute that would permit such result would convert its remedy into a snare for those availing themselves of it.

We think it is wholly unreasonable, therefore, to indulge the presumption of intention, on the part of Congress, to leave such a right in the plaintiff, merely because the letter of the statute does not deny it.

In our judgment, a better view, and one more in consonance with the spirit of the statute, is, that the technical plaintiff shall be regarded as plaintiff only in respect of his own demand, and that the technical defendant shall, as re-

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gards the subject-matter of his set-off or counterclaim, be regarded as a plaintiff also.

In this view of the situation and rights of the parties, respectively, each could waive or abandon his own independent demand without prejudice to the rights of the other. In other words, the plaintiff could take a voluntary nonsuit as to his cause of action, without putting the defendant's case out of court; and the defendant could, if so advised, withdraw his plea of set-off, and stand upon such independent defenses as he might have.

In either case, the right would remain to make the subject-matter withdrawn from issue the subject of a later independent action.

The court did not err, therefore, in proceeding with the trial upon the defendant's counterclaim, or in rendering judgment upon the verdict found, and it will be affirmed, with costs.

As, however, the plaintiff had the right to take a nonsuit, at the time of his motion, as to his own demand, without prejudice to his right to renew his action thereon, and as the recitals of the judgment might be construed hereafter as barring that right, the cause will be remanded, with direction, if the appellant so demands, to reform the judgment in that particular.

Affirmed.

Mr. Chief Justice ALVEY, dissenting:

I cannot concur in the opinion filed in this case. The common law prevails in this District, and is applicable in all cases where it is not superseded by express provision of some statute. In the absence of express statute taking away the right and declaring that a plaintiff shall be deprived of the immemorial common-law privilege of controlling his action, that is, whether it shall be prosecuted or *non pros'd*, by the mere election of the defendant to file a plea of set-off, is a proposition to which I cannot assent. If such a radical change in the right of the plaintiff had been intended by the act of Congress giving the right to the defendant to

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plead set-off, as matter of defense, it would, doubtless, have been so expressly provided. In failing so to provide, the common law is left unaffected and in full operation as to the power of the plaintiff over his action. To hold otherwise, as it seems to me, is judicial legislation of a very unwarrantable character. And this view appears to be in accordance with the great preponderance of authority upon the subject, as laid down in text-books of authority, and in judicial decisions in States where the matter has not been regulated by statute. I refer to those only cited in brief of counsel in support of the proposition, though others might be added. *Sewall v. Tarbox*, 30 Me. 27; *Theobald v. Colby*, 35 Me. 179; *Cummings v. Pruden*, 11 Mass. 206; *Anderson v. Gregory*, 43 Conn. 61; *Merchants' Bank v. Schulenberg*, 54 Mich. 49 (see opinion of Mr. Justice Cooley in this case); *Fink v. Bruhl*, 47 Mo. 173; *Wooster v. Burr*, 2 Wend. 295; *Seaboard R.R. Co. v. Ward*, 18 Barb. 595; *Fowler v. Lawson*, 15 Ark. 148; *Ruffington v. Quackenboss*, 5 Fla. 196, and affirmed in same volume, 496; *McCredy v. Fey*, 7 Watts, 496; *Bank v. Cargel*, 9 Watts & Serg. 15; *Ashmead v. Ashmead*, 23 Kan. 184; *Ins. Co. v. Barbour*, 95 Ky. 7.

These cases are well worth the careful attention and consideration of the profession, as relating to an important principle of practice, in which may be involved many serious consequences in departing therefrom without express legislative provision.

In addition to the cases cited, may be added the text-writers upon the subject, wherein it is laid down as settled that "A nonsuit is allowed notwithstanding a set-off has been pleaded. It is so held on the ground that, as the right of the plaintiff to discontinue his suit at any time before the verdict is undoubted, therefore, in the absence of a statute taking away the right, it still exists." 16 Am. & Eng. Encyc. of Law, p. 728. The same principle is laid down as firmly settled by the authorities in 2 Elliott's Gen. Prac., Sec. 883.

When a long and well-established principle is supposed to be liable in its operation to work inconvenience, or even injustice, in supposable cases, it is for the legislature, and

not the courts to enact the change or reform. I do not see, however, that there is any reform required in the long-established and well-settled principle involved in this case; and I am, therefore, opposed to making innovations simply because the settled principle or established practice may be inveighed against as being opposed to changes that may have taken place in some other jurisdictions.

The qualified right or privilege conceded to the plaintiff of withdrawing his claim, but without the right to *non-pros.* or nonsuit the action, and thus leaving the action depending in which the defendant may prosecute his set-off and obtain judgment against the plaintiff, would appear to be in the teeth of both the spirit and letter of the statute. The statute manifestly contemplates a trial as between the parties as to their respective claims, and *that judgment shall be entered for the balance found due, whether to the plaintiff or defendant, with costs.* This can only be done upon the trial of the issue of set-off, and the determination of the extent of the respective claims of the parties, according to the proof. If the claim of the plaintiff be withdrawn, and there is nothing remaining against which the claim of the defendant may be set-off, the question at once arises whether a judgment in such case is valid, or, if valid, whether it would not, as a necessary legal result by force of the statute, extinguish the claim of the plaintiff. These are questions that will inevitably arise under the decision now made. I think the judgment below ought to be reversed, without qualification.

AUSTIN v. JOHNSON.

PATENTS; INTERFERENCE; CONSTRUCTIVE REDUCTION TO PRACTICE;
DILIGENCE.

1. On an appeal to this court in an interference case, the question is as to priority of invention and not as to patentability; and, therefore, where an interference is declared between a reissue application and a patent, a ruling of the Patent Office will be accepted as conclusive that the claims in issue were sufficiently apparent from the specifications and drawings in the original application and that they constituted part of the invention intended to be covered by the original patent.
2. Where a reissue application is involved in an interference with a patent, the application is to be regarded as a continuation of the original application, and the applicant is entitled to the date of his original application as the date of a constructive reduction to practice.
3. Where one of the parties to an interference claimed to have conceived the invention in February, 1895, but laid it aside and was doing nothing when his rivals entered the field in June, 1895, although he could have reduced the invention to practice either actually by making the device or constructively by filing an application at any time he desired, it was *held* he was lacking in diligence.

No. 150. Patent Appeals. Submitted November 14, 1900. Decided April 2, 1901.

HEARING on an appeal from a decision of the Commissioner of Patents in an interference case. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. Knight Bros. for the appellant.

Messrs. H. P. Hood & Son for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This appeal is from the Patent Office, taken from the decision of the assistant Commissioner of Patents in a matter of interference, and the subject-matter of it relates to an improvement in railroad crossings.

The issues are three, framed in the following terms:

"1. In a railway crossing, the combination of turn-tables placed at the intersection of the main rails of the crossing tracks and each bearing two rail sections, the pivots of said tables being eccentrically located with relation to the intersecting lines of the main rails of the tracks, and means for turning said tables to bring the rail sections coincident with the main rails of their respective tracks, substantially as set forth.

"2. In a railway crossing, the combination of turn-tables placed at the intersections of the main rails of the crossing tracks and each bearing two rail sections, the pivots of said tables being concentrically located with relation to the tables and eccentrically located with relation to the intersecting lines of the main rails of the tracks, and means for turning said tables to bring the rail sections coincident with the main rails of their respective tracks, substantially as set forth.

"3. In a railroad crossing, the combination with the main rails approaching at an angle but not meeting, of a horizontally swinging pivoted section placed at each of the intersections of the lines of the main rails and each provided with a pair of rail sections, each of said rail sections being so arranged that it may be brought into alignment with the corresponding main rails, the arrangement being such that there is no overread."

These issues of interference were declared upon the application for a reissue patent by William H. Johnson and Stephen D. Fry. Stephen J. Austin, the appellant in this appeal, filed his application in the Patent Office, September 5, 1895, and obtained a patent thereon, December 3, 1895. Johnson and Fry filed their original application July 23,

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1895, and obtained a patent thereon February 25, 1896, nearly three months after Austin had obtained his patent; and after the lapse of more than sixteen months from the date of Austin's patent, Johnson and Fry filed an application for a reissue. In this application for reissue, claims were made for the first time, as supposed and held by the primary examiner, that interfered with the claims of Austin's patent, and interference was accordingly declared. It appears, therefore, that each party has obtained a patent, but both of the original applications were pending concurrently, though Johnson and Fry were the first to make application to the Patent Office. The examiner of interferences held, and his ruling was affirmed by the other tribunals of the Office on appeal, that, in determining the question of interference, Johnson and Fry were entitled to their original record date of July 23, 1895, and that it devolved upon Austin the burden to overcome that date, as the date of constructive reduction to practice of the invention of the present issues. This is controverted by the appellant Austin, who contends that there was no constructive reduction to practice by Johnson and Fry prior to May 12, 1897, the date of the application for reissue by them.

In this connection it is proper to notice what is shown by the record, that there was a motion by Johnson and Fry to dissolve the interference, as originally declared upon the alleged conflicting claims of the parties; and that motion was sustained as to claims 7, 9, and 10 of Johnson and Fry, from which ruling of the primary examiner, Austin appealed to the Commissioner; and the motion to dissolve was refused as to claims 5, 6, and 8 of Johnson and Fry, and as to claims 1, 2, and 3 of the patent to Austin, and from which ruling Johnson and Fry appealed. The rulings of the primary examiner presented on both appeals were affirmed. The assistant Commissioner, in passing upon these appeals from the primary examiner, said, that while there were certain differences between the claims of the parties, those differences were merely in description of functions as pointed out by the examiner in his decision, and did not arise from any essential difference in scope or in the statement or arrangement or re-

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lation of elements. These questions, however, are not presented for review on this appeal. On this appeal the question is as to priority of invention, and not as to patentability, and this court has to accept, as the examiner of interferences was bound to accept, under Rule 122 of the Patent Office, the rulings of the officials of the Patent Office, as decisive of the question that the claims now in issue were sufficiently apparent from the specification and drawings in the original application, and that they constituted part of the invention intended to be covered by the original patent. And it seems to be the settled practice in the Patent Office, that where the Office holds an applicant to be entitled to a reissue for broader claims it in effect holds that it was by reason of inadvertence, accident, or mistake that the applicant did not make the broad claims for his patent, and that he has been reasonably diligent in applying for such reissue, and, therefore, there has been no such dedication to the public of the invention covered by the broad claims as should prevent the Office from considering the reissue application *a continuation of the original application*. *Huson v. Crowell & Yates*, 64 O. G. 1006. And this being so, Johnson and Fry being the first to make application to the Patent Office, and as their application was then pending at the time of the application by and the grant of patent to Austin, it is clear, we think, that their original application is entitled to be considered as constructive reduction to practice of the inventions of the present issues; and that the burden of proof is upon Austin to show either that he conceived and reduced the invention to practical operation prior to the date of the Johnson and Fry application, or that he was the first to conceive the invention, and was diligently engaged in perfecting and reducing the same to practical operation when the original application of Johnson and Fry was filed.

The issues of the interference are framed (1) substantially in the words of Austin's patent claim 1, involving claim 5 of Johnson and Fry; (2) Austin's patent claim 2, involving claim 6 of Johnson and Fry; and (3) substantially the words of claim 8 of Johnson and Fry, and involving claim 3 of Aus-

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tin's patent; these being the claims remaining subject to the interference proceeding after the rulings upon the motion to dissolve. In reference to the issues thus made up, a considerable volume of testimony was taken in behalf of the respective parties, bearing upon the question of priority of invention.

The entire evidence has been very carefully examined by all three of the tribunals of the Patent Office — the examiner of interferences, the examiners-in-chief, and the assistant Commissioner — and they all came to the same conclusion, that is, that Johnson and Fry were entitled to priority of invention; and in that conclusion we fully concur. The evidence is conflicting, and very unsatisfactory. The *onus* of proof being upon Austin, we do not see how any other rational conclusion could have been arrived at than that reached by the tribunals of the Patent Office. Upon the subject of alleged disclosure of invention, a subject to which a large portion of the evidence is directed, the evidence on the part of Austin is anything but satisfactory; indeed, its reliability is exceedingly questionable. It is unnecessary to repeat the evidence in detail, as it could serve no useful purpose. But as a fair review of and comment upon the evidence, we cannot do better than to incorporate herein the following extract from the opinion of the assistant Commissioner, which deals with the most salient facts of the case:

"The testimony taken on the question of priority in this case is conflicting and very unsatisfactory. Johnson and Fry do not allege a conception of the invention until April 1, 1895, and Austin has introduced his own testimony and the testimony of two witnesses, Licht and Keeney, to the effect that a model introduced in evidence as Exhibit 3 was made prior to February 12, 1895. This model itself does not embody everything included in the issue, since it includes merely a single turn-table and not the combination of the several turn-tables which are necessary to a complete crossing or the means for operating all of those turn-tables together. It is true that this model would furnish a good basis for an oral disclosure of the entire device which Austin claims to have had in mind,

but the witnesses in his behalf fail to testify to any such complete disclosure. Their testimony as to the existence of even the model itself is far from satisfactory. They do not describe the construction disclosed to them, but merely say, after seeing Exhibit 3, that it is a device which they saw prior to February 12, 1895. Being apparently unable to describe the construction and operation of the device disclosed to them, it would seem that their identification of Exhibit 3 is based merely upon its appearance. They admit, however, that Austin made other crossings, and that they saw them, and there is no very satisfactory explanation how they are able to identify this particular model as one made prior to February 12, 1895. The model itself has several different dates written thereon, but it is admitted that they were placed there at different times, and that no one of them was written there at the time indicated by it.

"Even if this evidence is accepted as proving a conception of the invention by Austin at the time stated, he did not thereafter exercise diligence in the matter until after Johnson and Fry had entered the field, and he was the last to reduce to practice. There is no proof that he did anything further with the invention until after John and Fry had constructively reduced it to practice by filing their application. He does state that he commenced castings for a full-sized crossing in July, 1895, but he is not corroborated by any witnesses, and the witness Winslow, called by Johnson and Fry, states that he made the models for the castings referred to, and that they did not involve the invention here in controversy. Winslow is a prejudiced witness, and, therefore, his testimony is not entitled to much weight; but neither is the uncorroborated testimony of the inventor himself. It is also attempted by this witness to discredit the testimony of Austin and his witnesses in regard to a disclosure of the invention as early as February, 1895, but the substance of his testimony is merely that he was employed by Austin in the same works with the other witnesses and did not hear anything about the invention at that time. His testimony, therefore, has very little force.

"Johnson and Fry have introduced testimony to the effect

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that they disclosed the invention to others at least as early as the 1st of June, 1895. They have introduced three exhibits, photographs Nos. 1 and 2 and model No. 1, as illustrating the invention which they disclosed to others at that time. The photographs show everything embodied in the issue, but they were not made in June, 1895, and are introduced merely as an illustration of the thing which was disclosed at that time by other means. Model No. 1 is said to have been made in May, 1895, but, like Austin's Exhibit 3, it embodies merely a single turn-table and not the entire device in issue. The witness Lloyd states that Johnson and Fry showed him models like those illustrated in the photographs in May, 1895. A. E. Johnson states that model No. 1 was made about the first of June, and Parks corroborates him in this. Yeter states that he saw model No. 1 in May, 1895. The testimony of the witnesses as to the disclosure to them is not very full and satisfactory, but when taken in connection with the testimony of Johnson and Fry themselves it must be held to establish a conception by them as early as the 1st of June, 1895. This evidence is better than that produced on behalf of Austin, since the witnesses do give some description of the construction disclosed to them aside from referring to the exhibits, and, therefore, if the evidence for Austin is held to establish his conception in February, that for Johnson and Fry must be given as much weight in establishing their conception in June. This conception by Johnson and Fry in June was prior to the time when Austin claims to have commenced work on castings embodying the invention, and, therefore, it is immaterial whether or not he did make those castings, since he was doing nothing when Johnson and Fry entered the field. It is not claimed that Austin was unable to reduce the invention to practice, either actually by making the device or constructively by filing an application for a patent, at any time he desired, and, therefore, his action in laying aside the invention until after Johnson and Fry had entered the field shows a lack of diligence on his part. He filed other applications covering inventions on the same line in the meantime.

"There has been much testimony introduced in regard to

an alleged disclosure of the invention to Austin by Johnson and Fry in June, 1895. It is alleged that Austin made a trip at that time to Veedersburg, where Johnson and Fry's works were located, and that the invention was then disclosed to him; but this Austin denies. Several witnesses testify positively to this disclosure, and others testify to the fact that Austin was in Veedersburg at that time."

But however this fact may be, the testimony is in direct conflict in regard to it, and it is not deemed of any such material importance as to require of this court a judgment as to the truth or falsity of the allegation.

We affirm the decision of the acting Commissioner, and direct this decision and the proceeding in the cause to be certified to the Commissioner of Patents as directed by the statute.

WILKES v. WILKES.

EJECTMENT; DOWER.

1. Whether the heirs-at-law of a deceased mortgagor, who had remained in possession of the mortgage premises under an express covenant, or by apparent sufferance of the mortgagee, can maintain ejectment against a stranger having no claim under either the mortgage or the mortgagee, *quære*.
2. Where no dower has been assigned to the widow of a deceased grantor in a deed of trust, which conveyed the premises described therein to trustees to secure the payment of the deed of trust indebtedness, with the right in the grantor to remain in possession until default in the payment of the debt, and she occupies the premises as a home, her husband having left no other estate, his heirs-at-law cannot maintain an action of ejectment against her to recover possession of such premises; especially where the widow is also the administratrix of her deceased husband and, as such, the holder of the term of years created by the covenant in the deed of trust allowing him to remain in possession until default in payment of the deed of trust debt, the technical effect of which covenant, operating by way of redemise, was to create a legal estate for years in the grantor.

No. 1044. Submitted March 7, 1901. Decided April 2, 1901.

HEARING on an appeal by the defendant (specially al-

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Statement of the Case.

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lowed) from an interlocutory judgment of the Supreme Court of the District of Columbia sustaining a demurrer by the plaintiffs to defendant's pleas to a declaration in an action of ejectment.

Reversed.

The Court in its opinion stated the case as follows:

This case comes before us on a special appeal allowed from an interlocutory judgment in an action of ejectment.

The suit was begun by the appellees as heirs-at-law of Thomas M. Wilkes, deceased, against Kate S. Wilkes, to recover the possession of certain land in the city of Washington.

The declaration alleges that Thomas M. Wilkes was seized in fee of said lands and died intestate on December 11, 1898, whereupon the title thereto, with the right of immediate possession, devolved upon the plaintiffs, and that the defendant entered and ejected them, etc.

Defendant filed a number of pleas, from which it appears: That she was the wife of said Thomas M. Wilkes and resided with him upon the premises in controversy at the time of his decease, the same having long been the family home. That on May 6, 1897, she joined with said Thomas M. Wilkes in the execution of a deed of trust, "for the purpose of carrying into full effect the uses and trusts hereinafter declared and in consideration of \$5 paid," and so forth, conveying the premises to McLeran and Flather to have and to hold, and so forth, "*unto and to the use of*" the said trustees, "as joint tenants, their heirs and assigns *in and for the uses and trusts following, and to and for no other use, intent or purpose.*"

These are: 1. To secure the payment of a note of even date for \$4,300 made by said Wilkes and payable to the order of William E. H. Merritt five years after date, with interest, at 5 per cent. per annum, payable semi-annually, together with any expenses, attorney's fees, etc., arising in respect of the trust. 2. "*Until any sale and conveyance as*

~~hereinafter provided~~ for, to permit said Wilkes, his heirs and assigns, to possess and enjoy said described premises and to receive the issues and profits thereof;" and upon full payment, etc., to release said premises. 3. Upon default made in payment of said note or any installment of interest, and so forth, to sell the premises at public auction and convey the same to the purchaser at such sale, and so forth.

The said Thomas M. Wilkes thereafter had but a chancery trust in, and equity of, redemption of said premises. That defendant, having been in possession of the premises with her said husband, as their only property and home, at and before his decease, remained therein. That she has since been appointed administratrix of his estate. That, as widow, she had the possession of the premises, after his decease, under her right of quarantine and dower. And that, as administratrix, the chancery trust of said Wilkes, under the deed of trust aforesaid, devolved upon and became vested in defendant as administratrix aforesaid.

Plaintiffs demurred to the several pleas, the substance of which has been stated, and were sustained. It is from this judgment that the appeal was prayed and allowed.

Mr. Holmes Conrad and *Mr. Conway Robinson* for the appellant.

Mr. Frederic D. McKenney, *Mr. J. S. Flannery* and *Mr. Archibald Young* for the appellees:

1. The character of a conveyance and the quantity and extent of the estate conveyed thereby are to be determined and measured by the purposes for which the conveyance was made. *Doe v. Considine*, 6 Wall. 471; 2 Jarman on Wills, 156; 4 Kent's Commentaries, 233. This fundamental rule, which has been adopted in the construction of trusts created by will, is equally applicable to the construction of trusts created by agreement between the parties. A deed of trust is but a mortgage with a power of sale. If there is a power of sale, whether in the creditor or in some third person to whom

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Argument of Counsel.

the conveyance is made for the purpose of securing the payment of a debt, it is still, in effect, a mortgage, though, in form, a deed of trust. Boone on Mortgages, Sec. 226, citing *McLane v. Paschal*, 47 Tex. 369; *Blackwell v. Barnett*, 52 Tex. 333; *Wright v. Bundy*, 11 Ind. 398; *Newman v. Samuels*, 17 Iowa, 528; *Turner v. Watkins*, 31 Ark. 429; *Woodruff v. Robb*, 19 Ohio, 212; *Shillaber v. Robinson*, 97 U. S. 68. In those States where a mortgage is a mere security for a debt, and not an absolute transfer of the estate, it is generally held that a deed of trust is not a conveyance of the legal title to the trustee, but is in legal effect a mere mortgage. Boone on Mortgages, Sec. 226, citing *Webb v. Hoselton*, 4 Neb. 308; *Newman v. Samuels*, *supra*; *Blackwell v. Barnett*, *supra*; 2 Pingree on Mortgages, Sec. 1315; *Teal v. Walker*, 111 U. S. 242. If the deed of trust in this case is nothing more, in equity or at law, than a mortgage — a security for the payment of money — and the land conveyed thereby, as stated in *Teal v. Walker*, *supra*, is simply a pledge for the payment of the debt, the well-established rules of law prevailing in jurisdictions where mortgages are so regarded should govern this case. Boone on Mortgages, Sec. 111.

2. The identical question involved in this case was carefully considered by the Court of Appeals of Maryland, in the case of the *Georges Creek Co. v. Detmold*, 1 Md. 225, which was an action of ejectment to recover a tract of land in Allegany county, Maryland. The defendants set up, in bar of the plaintiff's right to recover, the existence of a deed of trust on the land. The court held this to be no bar to the right of the mortgagor to maintain an action of ejectment for the possession of the land, where the deed of trust stipulated that he should retain and enjoy possession until default.

Such a stipulation appears in the deed of trust in this case.

The deed of trust in this case, as we have shown, is nothing more than a security for money loaned. Under it the trustees have merely the naked title to the property. They can exercise no control over the property until default. Their trust is purely a passive one. Much of the apparent

conflict in the decisions in regard to the character of the estate conveyed to trustees, under such deeds of trust, will disappear, if we bear in mind the distinction between a passive and an active trust, or between a conveyance of property to trustees for specific purposes and a mere mortgage to secure money loaned. See *Lincoln v. French*, 105 U. S. 614; *Leonard v. Diamond*, 31 Md. 536; *Bank of Commerce v. Lanahan*, 45 Md. 396. See, also, Boone on Mortgages, Sec. 226; 1 Jones on Mortgages, Sec. 62; *McPherson v. Cox*, 96 U. S. 404; *Anderson v. White*, 2 App. D. C. 408.

3. It is undoubtedly true, as stated by this court in the very recent case of *Beyer v. Le Fevre*, 17 App. D. C. 238, "that an action of ejectment can only, as a general proposition, be maintained on a legal title, for the recovery of the land by the heir-at-law." But the strictness of this rule is relaxed where the person withholding possession is a *stranger* or *trespasser*. 10 Am. & Eng. Encyc. of Law, tit. Ejectment, 533, and cases there cited. See, also, *Id.*, 504, and cases cited in note 5; *Richardson v. B. & D. B. R. Co.*, 89 Md. 126; *Peltz v. Clark*, 5 Pet. 480.

4. The deed of trust involved in this case was executed May 6, 1897, nearly a year after the passage of the married woman's act now in force in this District (June, 1896). Before the passage of this act, the widow was not dowerable of the equitable estates of which her husband died seized. This statute changed the existing law by expressly giving the widow dower in the equitable as well as the legal estates of her husband. Under the statute in force in this District (9 Henry III, Ch. 7, Sec. 1, Abert's Comp. 36), she was entitled to retain possession of said dwelling-house for the period of her quarantine—that is, for the forty days next following the date of the death of her husband—but not for a longer period. If her dower was not assigned during this period, or if she was not satisfied with the manner of its assignment, she was given a means of compelling the heir to assign it or reassign it, as the case might be (13 Edward I, Ch. 4, Abert's Comp. 37). But, in no event, could she lawfully retain possession beyond the period of

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forty days mentioned. The defendant in this case, by withholding possession from the plaintiffs, the heirs-at-law of her deceased husband, placed herself in the same position that any trespasser or stranger would be in who might forcibly deprive them of the possession and enjoyment of their inheritance. The defendant being a trespasser, we submit that the plaintiffs can maintain their action of ejectment *against her*. By the terms of the deed of trust, the trustees have no right to take possession of the premises until default, and until default and a sale made by such trustees, the right of possession is expressly reserved to the grantor and his heirs.

It is submitted, in conclusion, that the plaintiffs below must maintain their action of ejectment in any event. In this District, the statute which abolished fictions in pleadings in actions of ejectment requires the action to be commenced *in the name of the real party in interest*. 16 Stats. 146; Sec. 809, R. S. D. C. In this case the *real parties in interest* are the plaintiffs, the *heirs of Thomas M. Wilkes*, the grantor in the deed of trust. The trustees have no interest in the property which would enable them to sue under this statute, and will have none until default be made.

Mr. Justice SHEPARD delivered the opinion of the Court:

Passing by, as immaterial to the disposition of this appeal, any mere technical questions relating to the character and form of the defensive pleas, the substantial question occurs: Whether the heirs-at-law of Thomas M. Wilkes, the deceased mortgagor, or grantor of the trust deed, have such apparent legal title and right of possession as entitle them to proceed at law by action of ejectment against his widow?

The first proposition on behalf of the appellant is, that the effect of the terms of the grant, to the trustees, their heirs and assigns, and "unto the use of them, their heirs and assigns," with the specification of a secondary use in respect of the security for the debt, was to vest an immediate legal title in them as bargainees. The argument is: The deed

expressly creating a use upon a use, the first use only was executed in the grantees by the Statute of Uses, thereby vesting in them a complete legal title subject only to defeasance by their actual reconveyance; the second use, and the grantor's equity of redemption, are mere chancery trusts, recognized, and enforceable upon occasion, only in equity.

Technically, this may be correct; but a better view would seem to be, that courts of law will now look to the substance rather than the form of such instruments as this — the real intent of the grant — and, as a consequence, regard the title of the trustees as determinable by the real purposes of the uses or trusts.

As a general rule, it is well settled that the nature and extent of a trustee's title depend, not so much upon the terms of its grant, as upon the purposes and requirements of the trust imposed. Where these are plain and certain, they will limit and restrain the language used in creating the title of the trustee. *Poor v. Considine*, 6 Wall. 458; *Young v. Bradley*, 101 U. S. 782, 787; *Potter v. Couch*, 141 U. S. 296, 309; *Frey v. Allen*, 9 App. D. C. 400, 403; 1 Perry on Trusts, Sec. 312.

It is not necessary, however, to the disposition of the case, that the precise question, as presented, should be determined; for, whether the deed of trust be regarded as having created a trust, so far active as to maintain the legal title of the trustees, or as a mere mortgage, it is sufficient for all the practical purposes of the appellant's contention.

Whatever may have been the progressive spirit manifested by courts of law in other jurisdictions in adopting the equitable view of the effect of such conveyances, the courts controlling in this jurisdiction have, in the absence of statutory change, adhered, in the main, to the strict rule of the common law.

Undoubtedly, as between mortgagor and mortgagee and their privies, in the District of Columbia, the effect of either the regular mortgage or the deed of trust as a substitute therefor, has always been considered to vest the legal title in the mortgagee or trustee, subject to defeasance only by the

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satisfaction of the secured debt. Upon this foundation rest the decisions that the widow of a deceased mortgagor was not entitled to dower in the mortgaged premises, and that the mortgagor has no title or interest subject to the levy of execution. *Stelle v. Carroll*, 12 Pet. 201, 205; *Van Ness v. Hyatt*, 13 Pet. 294, 298; *Bank v. Guttschlick*, 14 Pet. 19, 28; *Smith v. McCann*, 24 How. 398, 404; *Morsell v. First National Bank*, 91 U. S. 357.

For the same reason, it has been held by the Supreme Court of the United States, in cases arising elsewhere than in Maryland or the District of Columbia, that the grantor in a deed of trust, not intended to operate as a mortgage, could not maintain ejectment without a reconveyance. (*Lincoln v. French*, 105 U. S. 614); and that a mortgagor could not recover possession in ejectment against the mortgagee or his assigns. *Brobst v. Brock*, 10 Wall. 519; *Bryan v. Brasius*, 162 U. S. 415, 418.

And, in an analogous case in this court, it was said: "This equitable title, therefore, was not such as would, ordinarily, maintain an action of ejectment at law for the recovery of the land by the heir-at-law against parties claiming as devisees under the alleged will of the deceased, the grantor in the deed of trust." *Beyer v. Le Fevre*, 17 App. D. C. 238.

Whether a mortgagor, remaining in possession by the express terms of the instrument, or by the sufferance or implied consent of the mortgagee, either before or after breach of the condition, can maintain an action of ejectment against one not claiming under the mortgagee; or, in other words, whether such third person can set up the outstanding legal title of the mortgagee, is a question, however, that has never been expressly decided in this jurisdiction, so far as we have been able to discover, and it may, therefore, be regarded as an open one in this court.

In Maryland, it has been held, since the cession of the territory of the District of Columbia, that where the mortgage contained a covenant that the mortgagor should remain in possession until default, the latter might recover in eject-

ment, because the covenant, operating by way of redemise, left him the substantial owner both in equity and at law. *Georges Creek Coal Co. v. Detmold*, 1 Md. 225, 234. See, also, *Jamieson v. Bruce*, 6 G. & J. 72, 74; *Chelton v. Green*, 65 Md. 272, 277; *Richardson v. B. & D. RR.*, 89 Md. 126, 129.

And in other jurisdictions, where the distinctions between law and equity, and the idea of a division of title under a mortgage into legal and equitable, prevailed, it has been held that a stranger to an unsatisfied mortgage could not set up the outstanding legal title of the mortgagee as against the right of the mortgagor in possession, even without an express covenant therefor, to recover in ejectment. *Den v. Dimon*, 10 N. J. L. 184; *Allen v. Kellam*, 69 Ala. 442, 447; *Melenthin v. Keith*, 17 Fed. Rep. 583.

If the case at bar presented only the question of the right of the heirs-at-law of a deceased mortgagor, who had remained in possession, either under an express covenant, or by apparent sufferance of the mortgagee, to recover in an action of ejectment against a stranger having no claim under either the mortgage, or the mortgagee, its determination would be embarrassed by the settled distinction between the jurisdictions of courts of law and of equity in the District of Columbia, and by the nonprogressive attitude, so to speak, of the courts of law in respect of the substantial relations between mortgagor and mortgagee created by a formal mortgage.

In such event, it would seem reasonable and just that the rigor of the ancient rule of the common law should be relaxed; and the writer, at least, would be strongly inclined to hold that the title conferred upon the mortgagee, or the independent trustee, to secure a debt, is to be regarded as limited by and to the plain purposes of the grant, and that so limited there would remain in the mortgagor, as against all persons not entitled to claim under the mortgage, a sufficient title to enable him to maintain an action of ejectment.

But, whatever might be the right of the heirs-at-law of a deceased mortgagor to maintain ejectment against a stranger

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to the mortgage conveyance, we are agreed in the opinion that, in the case at bar, they have no such right of possession as against the widow of the deceased mortgagor.

In the first place, she is entitled to dower in the equitable estate of her husband, he having died since the passage of the recent statute changing the former rule of law in that respect. Act June 1, 1896 (29 Stat. 194). It appears from one of the pleas that the defendant and her husband occupied the premises as a home at the time of his decease; that he left no other estate; that during her period of quarantine no dower was assigned to her; and that she remains in possession by virtue of her dower right therein.

It seems that by the common law (now generally changed in those States where dower exists at all), the widow was regarded as having no vested estate in any particular lands of her deceased husband, and the heir-at-law might even put her out of possession and force her to her writ of dower, or to a bill for its assignment.

The reasons for that rule, founded in the nature of then existing tenures, and specially applying where there might be distinct parcels of land in more than one possession, and also more than one messuage, would appear to fail when applied to present conditions of land ownership in connection with the particular facts of the case at bar. Here there is no other property than the home of which the widow retains an actual possession that was lawful in its origin.

Being in such possession of the only piece of property in which her dower could be assigned, her right thereto ought to confer upon her such continuing right of possession as to bar ejectment by the heirs-at-law, whose duty it was to make the proper assignment. So to hold avoids circuity of action by compelling the heirs-at-law to proceed to assign dower; for, otherwise, she would be cruelly ejected from her only shelter and driven to her action at law or suit in equity for immediate reinstatement in that from which she had been expelled. This seems to be in complete accord with the provisions of the act (9 Henry III, Ch. 7, Sec. 1), reaffirming the provisions of Magna Charta, and still in force in

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this District, which reads: "And she shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be assigned her (if it were not assigned her before), or that the house be a castle; and if she depart from the castle, then a competent house shall be forthwith provided for her, in the which she may honestly dwell, until her dower be to her assigned, as it is aforesaid; and she shall have in the meantime her reasonable estovers of the common." Comp. Stat. D. C. 36, Sec. 164.

In the next place, the facts show that the defendant is also the administratrix of the estate of her husband, who died intestate.

His trust deed created an active trust that would, at law, have entitled the trustees to immediate possession had not the instrument contained an express covenant for his remaining in undisputed possession until default in payment.

This covenant operated by way of redemise, as we have heretofore seen, and its technical effect was to create a legal estate for years in the grantor or mortgagor. No default having occurred, and no action having been taken by the trustees on behalf of their *cestui que trust* to alter the possession, this term devolved as a chattel interest upon the defendant as administratrix.

Upon both grounds, therefore, we are of the opinion that the pleas were good and ought to have been sustained.

It follows that the judgment appealed from must be reversed, with costs, and the cause will be remanded with direction to enter an order overruling the demurrer to the defendant's pleas as amended. It is so ordered.

Reversed.

FARROW

v.

THE ECLIPSE BICYCLE COMPANY.

RES JUDICATA; EQUITY PLEADING AND PRACTICE; APPELLATE PRACTICE;
INTERLOCUTORY APPEALS; AMENDMENT OF ANSWER; OPINION OF
COURT, CONSTRUCTION OF.

1. The adjudication of this court upon an interlocutory appeal from a decree for an accounting in favor of the complainant, is so far conclusive and binding upon the lower court as to preclude the granting by that court thereafter of leave to the defendant to amend its answer and to reopen the cause by taking additional testimony in support thereof; but upon a special application made for that purpose, leave may be granted by this court, under such circumstances, to so file an amended answer and reopen the case.
2. The showing made in support of an application or suggestion that this court, after its affirmance of an interlocutory decree in favor of the complainant for an accounting, permit the defendant to file an amended answer to the bill of complaint and take additional testimony in support thereof, upon the grounds that the complainant fraudulently concealed the existence of a certain patent from the defendant, his assignee of an application for a patent, and that the defendant was under a misapprehension as to the nature of the suit and complainant's claim, *held* insufficient to call for such action by this court.
3. In construing an opinion of the court, the expressions contained therein are to be construed with reference to the subject-matter under consideration.

No. 1084. Submitted March 7, 1901. Decided April 2, 1901.

HEARING on an appeal by the complainant (specially allowed) from an interlocutory order of the Supreme Court of the District of Columbia granting leave to a defendant in an equity suit to amend its answer and take additional testimony in support thereof, after a former interlocutory decree in favor of the complainant for an accounting had been affirmed by this court and the cause remanded for the taking of the account decreed.

Reversed.

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The Court in its opinion stated the case as follows:

This cause was formerly before us on a special appeal allowed to the defendant in the court below, the present appellee, the Eclipse Bicycle Company, from a decree of the Supreme Court of the District of Columbia, by which it had been adjudged that the complainant in the cause, the present appellant, was entitled to an accounting from the defendant for royalties on certain patented devices manufactured by it, and by which also the cause was referred to the auditor of the court for the statement of such account, a decree which this court affirmed. *The Eclipse Bicycle Company v. Farrow*, 16 App. D. C. 468. After the cause had been remanded, and when it was before the auditor for the accounting which had been decreed, the defendant company filed a motion, through new counsel, for leave to amend its answer and to reopen the cause by taking additional testimony in support of its answer; and in aid of this motion it filed several affidavits, with numerous exhibits attached. The general purport of the motion and the affidavits was that there had been fraudulent concealment on the part of the complainant, and that the defendant, during the whole course of the litigation, had been under a misapprehension as to the nature of the complainant's claim against it. An answer to the motion, likewise supported by affidavit, was filed by the complainant. The court allowed the motion and entered an order granting leave, as prayed, to amend the answer, and to take further testimony.

From this order the complainant has prayed and has been allowed a special appeal to this court.

[The further material facts will be found stated in the opinion — REPORTER.]

Mr. Henry M. Earle and *Mr. J. C. Gittings* for the appellant:

1. The decree is that of the Court of Appeals, and having been affirmed upon appeal, the subject thereof becomes *res ad-*

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judicata. Southard et al. v. Russell, 16 How. 547-570; *Kimberley v. Arms*, 40 Fed. Rep. 548; *Baker v. Humphrey*, 103 U. S. 736; *Stewart v. Salmon*, 97 U. S. 361. The decree in the case at bar adjudicated the merits, and is, therefore, final. This court is vested with jurisdiction of interlocutory appeals, and a decision, therefore, makes such decree that of the appellate court, equally with any decision from appeal of a final decree. See *Gilbert v. The Washington Beneficial Endowment Association*, 15 App. D. C. 40.

2. Permission must be given by the appellate court to allow review of its decree upon grounds of newly-discovered evidence. *Savings Bank v. Taylor*, 53 Fed. Rep. 854.

3. If it be admitted for the purposes of illustration that it be permissible for the lower court to suspend the operation of a decree of this court, and grant leave to reopen the merits of the case, nevertheless the grounds set forth in the appellee's moving papers are insufficient and improbable. The greatest negligence is shown to have existed on the part of the appellee, and evidence of their disingenuousness is apparent throughout.

4. The discretionary power of a court of equity to allow amendment of pleadings, is elaborately treated by Story, J., in case of *Smith v. Babcock*, 3 Sumner, 586. In that case amendment was allowed. The circumstances differed materially from the case at bar, the amendment desired being the substitution of an exhibit in lieu of one that had been erroneously attached to the answer. The amendment was permitted with great reluctancy, it being stated by the court, that "before an answer should be allowed to be amended it should be proved that the reasons are cogent and satisfactory." See, also, *Calloway v. Dodson*, 1 Brockenborough, 122.

5. The decree is that of this court; it adjudicates the merits of this case; it contains a reference to the auditor to state an account, and it is suspended by an order of an inferior court. This court allowed an appeal from the decree of the lower court, which they would not have done, had not the cause been finally disposed of by the lower court, for otherwise the jurisdiction would have been divided, and a part re-

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 maintained in the trial court while another part was transferred to the appellate tribunal. Therefore, the decree of this court was final, the appeal was not interlocutory. The fact that further orders of the court are necessary to carry into effect the decree, does not make it any the less final in its nature. *Stovall v. Banks*, 10 Wall. 585; *RR. Co. v. Bradley*, 7 Wall. 577; *Thompson v. Dean*, 7 Wall. 342.

6 Assuming that the decree was an interlocutory decree, the lower court, under its rules, was powerless to set it aside, as more than two terms have passed since the term in which same was rendered. The order granting the motion to amend the answer and introduce testimony after a final decree by this court, was unauthorized, and should be reversed. Section 954 of the Revised Statutes of the United States, relating to amendments of pleadings, does not contemplate applications for leave to amend subsequent to a final decree of an appellate court, as clearly appears from general equity rule 60, of the Supreme Court of the United States.

Mr. A. S. Worthington, Mr. D. S. Mackall and Mr. H. L. Osgood for the appellee :

1. The decree of January 31, 1900, in the court below, affirmed by this court on special appeal, was interlocutory, not final. That the decree in question was interlocutory only seems to be so well settled by the Supreme Court of the United States that we deem it necessary only to refer to a few of the cases in that court. *Fourniquet v. Perkins*, 16 How. 82; *Iowa v. Illinois*, 151 U. S. 238; *Keystone, etc., Company v. Martin*, 132 U. S. 91; *Lodge v. Twell*, 135 U. S. 232; *McGourkey v. Toledo & Ohio Railway Co.*, 146 U. S. 537-544.

2. And as that decree was not a final one, the court below had full power after it was entered to allow amendments of the pleadings and the reopening of the evidence. R. S. U. S., Sec. 954; Equity Rule 55, Supreme Court of the District of Columbia; *Neale v. Neale*, 9 Wall. 1; *Estho v. Lear*, 7 Pet. 130; *Garland v. Davis*, 4 How. 131; *Hardin v. Boyd*, 113 U. S. 756-768; *Richmond v. Irons*, 121 U. S. 47; *Brown v. Bos-*

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worth, 62 Wis. 542. Even where the case has been taken to the appellate court to review the final action of the court below and the judgment or decree below has been reversed, if the mandate simply sends the case back for further proceedings, the power of the court below to allow amendments is not necessarily at an end. *Hodgson v. Marine Fire Ins. Co.*, 6 Cranch, 206.

3. The failure of the complainant's counsel to raise the question of jurisdiction in the court below is fatal to their claim that before filing their application for leave to amend in the court below the defendant should have applied to this court for an order permitting such an application to be filed. This court has very ample authority by its rules to regulate proceedings in the court below in all matters relating to appeals. It has not as yet promulgated any rule relating to proceedings in the court below after an appeal to this court from an *interlocutory* order or decree. It would seem that until by such a rule it restrains the power of the court below, that power remains unimpaired in a situation such as existed when the defendant's counsel deemed it necessary to apply to the court below for leave to amend the pleadings in this case. The cases relied upon by opposing counsel are all cases in which the appeal was from a final decree. There being thus neither rule nor precedent to apply to the case, it was in the highest degree incumbent upon counsel for the complainant, if they questioned the power of the court below in the premises, to have made the objection at the earliest possible moment. But, instead of doing so, they did not make the objection in the court below at all, but proceeded to file an answer, supported by affidavits, assailing the application on its merits, and on its merits alone. In *Reynes v. Dumont*, 130 U. S. 354-395, and in *Brown v. Iron Company*, 134 U. S. 530, the Supreme Court held that the objection of want of jurisdiction of the subject-matter in a court of equity cannot be first raised in the appellate court if the case falls within any general class of cases in which a court of equity might have jurisdiction under any circumstances. We doubt whether the objection which is made here, assuming it to be well founded, can properly be

considered as raising a question of jurisdiction at all. It seems to us to involve rather an irregularity of procedure, and to fall within the general rule that he who wishes to object to a mere irregularity must make the objection before he takes any further step in the case. *Roach v. Hulings*, 16 Pet. 321. See, also, *Russell v. Southard*, 12 How. 139; *Southard v. Russell*, 16 How. 547; *Potts' Case*, 166 U. S. 263; *Watson v. Stevens*, 53 Fed. Rep. 31; *Marquand's Case*, 57 Fed. Rep. 189; *Montana Ore Purchasing Co. v. Boston, etc., Mining Co.*, 85 Fed. Rep. 867; *Railroad Co. v. Nichols*, 85 Fed. Rep. 869; *Woodward v. Boston Casting Machine Co.*, 63 Fed. Rep. 609.

4. On the merits, the order appealed from was properly made. We need not cite authorities on the point that there is a strong presumption in favor of an order made by any court in the exercise of a discretionary power. This presumption applies especially to orders which merely tend to allow the parties to fully present their case to the court. In this case the presumption receives additional force from the fact that the order reopening the case was made by the same judge who had heard the case argued and reargued and had decided it against the party making the application. A clearer case of the conduct of a suit under a mistake as to the question involved, as finally indicated by the decision of the appellate court, can hardly be imagined. And even if this had resulted, through the inadvertence of defendant's counsel alone, it would be against all the rules which govern courts in modern times to allow the client to be so severely punished for that reason. It is every-day practice in a court of law, after a case has been fully prepared and tried and is ready to be submitted to the jury, to have one party or the other allowed to withdraw a juror and amend his declaration or his plea because of some defect of which, in strictness, counsel should have taken notice before issue was joined; and in the court of chancery it often happens that after a case has been submitted to the court on final hearing the chancellor suggests an amendment to the pleadings in order that justice may be done. See, on this general subject, two remarkable cases in which amendments were

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allowed under circumstances much stronger against the applicant than anything that is urged here. *Drew v. Beard*, 107 Mass. 64; *Welch v. Arnett*, 46 N. J. Eq. 548.

5. One of the important questions of fact in the case was whether or not the defendant company had knowledge of the existence of the Stover and Hance patent at the time it entered into the contract with Farrow, and the evidence, in the form of letters, now sought to be introduced, render it almost certain that it did not have such knowledge; and, moreover, that the first knowledge it acquired on the subject was derived from Farrow himself long after the making of the contract in question. See *Muloch v. Muloch*, 26 N. J. Eq. 15, where it is held that the rule with respect to merely cumulative evidence is subject to the exception that where such evidence will make plain and certain that which before was mysterious and doubtful it will be received.

6. It is said that practical difficulties have arisen in carrying out the provision of law which authorizes this court to allow a special appeal from any interlocutory order of the Supreme Court of the District or of any justice thereof. These difficulties arise mainly when upon such a special appeal this court affirms the order appealed from, and such difficulties may be reduced to a minimum, if not entirely obviated, by dismissing the appeal when the court does not see its way clear to reverse the order which, in the first instance, it has undertaken to review in advance of a final determination of the case in the court below. If, for instance, when the first special appeal in this case had been heard, the court, instead of affirming the order appealed from, which rendered necessary a full discussion of the merits of the case, had dismissed the appeal, the court below would have had the undoubted right to allow the amendments and exercise its other discretionary powers as though the case had not been to the Court of Appeals at all. In that event the case would have come here on appeal from a final decree, and thus would not have been hampered by any previous piecemeal consideration of the case. With deference we submit that the course suggested should be pursued now. As soon as counsel for the defendant learned that the applica-

tion for the allowance of this special appeal had been made, they endeavored to have a hearing before the court took action, but were advised that the special appeal had then already been allowed. If they had had an opportunity to be heard, they would then have suggested to the court what they urge now — that it would be wise to allow the case to proceed in the court below under the order reopening the case to a final decree, and that when the case is brought here on appeal from such a final decree, the whole merits of the case will be presented here and the court will be enabled to do full justice between the parties upon a complete presentation by each of them of his entire case. The court can then as well as now give such consideration as may seem to it just to the proposition so strongly urged here, that the defendant was negligent in the presentation of its case under the original pleadings. It can then much better than now determine what weight, if any, shall be given to the fact that the application for leave to amend was not made until after the death of Pollard.

Such action would be analogous to that frequently taken by the Supreme Court of the United States in postponing till the hearing on the merits a motion to dismiss an appeal.

7. And, finally, the novel circumstances of this case, in its present situation, will enable the court, if it see fit, to define by a general rule the power of the court below to allow amendments after a case has been to the Court of Appeals on appeal from an interlocutory order.

But we respectfully submit that more harm than good would be likely to result from limiting in any way the power of a judge who is hearing a case in the first instance in the exercise of his discretion in regard to amendments of the pleadings or the introduction of additional evidence. We have not undertaken to examine particularly into the practice of the State courts in this regard, but incidentally decisions of those courts have come to our notice which indicate that this view of the matter is taken by them. See, for instance, *Henry v. Allen*, 147 N. Y. 346; *Keister v. Rankin*, 34 App. Div. (N. Y.) 288; *Cross v. Zellerbach*, 13 Cal. 633, 637; *Putnam v. Clark*, 35 N. J. Eq. 145; *Miller v. Cook*, 77 Va. 806. And

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see Story's Eq. Pl., Sec. 418; 2 Daniell's Chan. Pr. 1579. We have already seen that in several cases in the Circuit Courts of Appeals those courts have declined to make an order allowing application for leave to amend to be made to the court below after an appeal, because the court below had full power in that regard without any such order. *In re Marquand*, 57 Fed. Rep. 189; *Montana Ore Purchasing Company v. Boston, etc., Mining Company*, 85 Fed. Rep. 867-869; *Vicksburg R. Co. v. Nichols*, 85 Fed. Rep. 869, 870.

Mr. Earle and Mr. Gittings in reply:

1. Whether or not special appeals should be allowed in all cases it does not seem necessary to discuss at this time; the sole point is, whether this is such a case as merits the attention of the court, at this stage on appeal; and we submit that it would be hard to conceive of a case that could be presented which, to preserve the rights of the parties, requires more immediate action. The appellant has expended nearly two years in endeavoring to secure his rights and, after finally having them adjudicated by this court, he is virtually held up by a void order of the court below which attempts to place him in the same position he occupied prior to the original hearing of his case. If this order appealed from is null and void, as we most strenuously contend that it is, why should appellant's rights be withheld from him until the appellee has time to offer evidence which is clearly immaterial and irrelevant?

The proposition that, if this case had been dismissed when brought here by appellee the first time, the court below would have had the undoubted right to allow amendments in its discretion as though the case had never been to this court at all, it is submitted is unsound. This motion was filed by appellee in the court below, after ten terms of the court had passed, subsequent to the rendering of the decree. See Equity Rule 88 of the Supreme Court of the District of Columbia, providing that "No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded if an appeal lies to the Court of Appeals. But if no

was appealable, the petition may be admitted at any time before the end of the next term of the court in the discretion of the court."

2. Appellee's contention that the decree of January 1, 1900, is merely interlocutory, cannot have any bearing upon the present appeal. The case was heard in this court upon its merits, and so far as the merits between the parties are concerned, we submit, it certainly has the same *force and effect* as a final decree, and is *res adjudicata*.

3. Appellee's contention that because the decree was not final, the court below had the power to entertain the motions is clearly unsound, and we respectfully submit unsupported by any authorities cited by it.

The motion in this case is not analogous to such as is contemplated by section 954 of the Revised Statutes of the United States, or Equity Rule 55 of the Supreme Court of the District of Columbia.

Courts will not allow amendments unless the parties will thereby be placed *in statu quo*; the following authorities are submitted: *Smallwood v. Lewin*, 13 N. J. Eq. 123; *McDougal v. Purrier*, 4 Russell (Eng. Chan. Rep.) 486.

4. The statement that the question of jurisdiction was first raised in this court, we submit is erroneous; but even if this was true, it would not give the Supreme Court of the District of Columbia jurisdiction to vacate or suspend the operation of the decree of this court. It is a well-settled principle of law that where a question of jurisdiction goes to the subject-matter, the parties cannot, by submission, clothe the court with a power that belongs to another tribunal. The rule laid down in the following cases, namely, *Raynes v. Dumont*, 130 U. S. 354-395; *Brown v. Iron Company*, 134 U. S. 530; *Roach v. Hurlings*, 16 Pet. 321, is to the effect that, where the subject-matter belongs to the class over which a court of equity has jurisdiction, and the objection that there is an adequate remedy at law is not made until a hearing in the appellate tribunal, it comes too late. But that is an entirely different case from this. The court below was without jurisdiction to entertain appellee's motion; the United States

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Supreme Court in the following cases clearly settles this contention: *In re Potts*, 166 U. S. 266; *Southard v. Russell*, 16 How. 547; *Durant v. Essex Co.*, 101 U. S. 556. The right of an appellate court to give the court below such authority, in its decree, or mandate, we do not question; but unquestionably this right must be confined to some definite limits, and we respectfully submit that a motion coming six months after a decree has been made should not be entertained, and under the rules of the court below, heretofore cited, the court would be without authority to consider it.

Mr. Justice MORRIS delivered the opinion of the Court:

Two questions are raised by the assignments of error: (1) Whether the adjudication of this court on the former interlocutory appeal is so far conclusive and binding on the lower court as to preclude the reopening of the cause upon any ground or for any cause whatever; (2) Whether, if such adjudication does not preclude the reopening of the cause, the action of the court below was a proper exercise of its discretion in the premises. Of course, if the first of these two questions is to be answered in the affirmative, the second will not require consideration.

We understand it to be conceded, and upon principle and authority it must be conceded, that, after a final decree affirmed on appeal, with a remand of the cause to the lower tribunal for such proceedings as may be necessary or proper to carry such decree into effect, the lower court is without jurisdiction to do anything in the cause except such proceedings as are contemplated in the mandate which remands the cause. The litigation has become *res judicata*, and it is no longer competent for the lower court to reopen it, for the purpose of amendment of the pleadings, introduction of new testimony, or for any other purpose. The authorities are believed to be unanimous on this point. We need only refer to the decisions of the Supreme Court of the United States in regard to it. *Stewart v. Salamon*, 97 U. S. 361; *Humphrey v. Baker*, 103 U. S. 736; *Southard v. Russell*, 16 How. 547;

Smale v. Mitchell, 143 U. S. 99; *In re Washington & Georgetown R.R. Co.*, 140 U. S. 91; *Hickman v. Fort Scott*, 141 U. S. 415.

In the case of *Stewart v. Salamon*, 97 U. S. 361, the Supreme Court of the United States, by Mr. Chief Justice Waite, said:

“This is an appeal from a decree entered upon our mandate. No complaint is made as to its form, and it seems to be in all respects according to our directions. The effort of the appellant was to open the case below, and to obtain leave to file new pleadings, introducing new defenses. This he could not do. The rights of the parties in the subject-matter of the suit were finally determined upon the original appeal, and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions, and carry it into effect. If, in the progress of the execution of the decree, after its entry, either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for re-examination only the proceedings subsequent to the mandate.”

It is likewise settled law, that, when the decree of a lower court has been affirmed on appeal, or when a decree has been entered in the lower court in conformity with the mandate of an appellate tribunal, a bill of review cannot be filed in the lower court without the permission of the appellate tribunal. The application for leave to file is to be made to the appellate court. *Purcell v. Coleman & Miner*, 4 Wall. 510; *Rubber Co. v. Goodyear*, 9 Wall. 805; *Savings Bank v. Taylor*, 53 Fed. Rep. 854; *Southard v. Russell*, 16 How. 547; *Gaines v. Rugg*, 148 U. S. 228; *In re Potts*, 166 U. S. 263, 267; *Story's Eq. Pl.*, Sec. 408.

But the question here is, how far the rule that a lower court may not reopen a cause after the affirmance of a final decree by an appellate court, or after the entry of a final decree in pursuance of the mandate of an appellate court, is applicable to the matter of interlocutory appeals, such as are authorized under our present law. And this question, as it is a novel one in this jurisdiction and likely to recur at any time, it is im-

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portant to settle at this time as far as it is possible for us to do so.

The allowance of appeals from interlocutory orders or decrees is not a new thing in the law. It was common enough in the former English Chancery practice, in which appeals were frequent from the Lord Chancellor to the House of Lords from interlocutory orders appearing to affect the merits of the cause (*Daniell's Chan. Prac.*, p. 1634), and in which the reason given for this exercise of appellate power was "that courts of equity often decide the merits of the case in intermediate orders, and the permitting of an appeal in the early stage of the proceedings frequently saves the expense of further prosecuting the suit." This right of appeal, however, was confined to equity, inasmuch as in the nature of things there could not well be at common law any such absolute determination of right by interlocutory order. In our American Federal practice, and in the judicial practice of most of the States of our Union, in which the subject has generally been regulated by statute, appellate jurisdiction is usually restricted to the review of final judgments and decrees, and the English Chancery practice does not usually obtain. As between the general term and the special terms of the Supreme Court of the District of Columbia, as we all know, there was a power of review by the former of orders made by the latter which "involved the merits" of the action, the indefiniteness of which was the cause of great difficulty and inconvenience. The statute creating this court strove to be more specific; but at the same time it is broader and wider than any previous enactment or any previous practice, since it authorizes the allowance of appeals from any orders whatever, either at common law or in equity, and in criminal as well as civil cases, wherever it seems to this court upon petition filed for the purpose to be in the interest of justice to allow such appeals.

The exercise of this appellate power is not without difficulty. While it should be liberally and freely admitted in order to subserve the beneficent purpose for which the statute was enacted, yet undoubtedly the matter of the allowance of

interlocutory appeals should be carefully guarded, so as that it should not have the effect of embarrassing the administration of justice instead of facilitating it. The case before us is a fair illustration of the possibilities of inconvenience that may result from such appeals; for this is the second interlocutory appeal, and it is almost the natural result of the first, and there is probability of at least two further appeals. Now, the multiplication of appeals is not in the interest of justice, and cannot subserve any good purpose. And we may add here that, in all cases in which this court is placed in the position of a merely intermediate appellate tribunal, it is greatly to be questioned whether the allowance of interlocutory appeals does not tend to complicate and unduly prolong the litigation.

In the allowance of appeals, where the allowance is in the discretion of this court, we are bound by the limitation that it must appear to be in the interest of justice that the appeal should be allowed. It must, therefore, determine something, and the determination must have the effect of finality so far as it is possible that there should be finality at such stage of the proceedings. If it were open to the court below to disregard the decision of the appellate tribunal upon such appeal, or to go behind it and reopen the cause, or to treat an interlocutory order affirmed upon appeal or directed to be entered by the appellate court as one of its own orders which it might vacate at its pleasure, this right of appeal would become a mere mockery of justice and would wholly fail to accomplish the purpose for which it was intended by the legislative authority. In appealing to this court parties are to be presumed to have exhausted their remedy in the court below upon the subject-matter of appeal. That, after their defeat upon the appeal, they should be permitted by the court below to go behind the appellate decision and bring forward other defenses which they had all the time but did not choose to present, would be an anomaly in the law.

We must hold that, in the case of interlocutory appeals, equally as in the case of appeals from final judgments and decrees, the decision of the appellate tribunal becomes the law

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of the cause, final and irrevocable, upon all the questions involved or that might have properly been brought forward in such interlocutory decision, save only that the appellate tribunal itself, upon a proper showing, may revoke or modify its decision, or allow the cause to be reopened; and save, also, that, upon final hearing, the court below may not necessarily be bound in all cases by such interlocutory decision of the appellate court. If, for example, an injunction *pendente lite* is allowed by the lower court, and the order for its allowance is affirmed by this court upon appeal, it is not competent for the lower court thereafter during the pendency of the suit to disturb such injunction; but this would not preclude the court, upon final hearing, from dissolving the injunction and dismissing the bill of complaint, for then a new condition may be presented very different from that which appeared when the injunction was granted in the first instance.

But that a cause may be reopened, under proper conditions, at any stage of the proceedings, is familiar law. A motion for a new trial after verdict at common law is of daily occurrence. When such motion is based upon newly-discovered evidence of a substantial character, which with reasonable diligence could not have been procured before, it is almost a matter of course to reopen a cause. It is a provision of our statute that even a final judgment may be vacated at any time for fraud, surprise, or irregularity in its procurement. A bill of review in equity based upon newly-discovered evidence is a well-known proceeding. If, therefore, a cause may be reopened upon sufficient grounds even after final judgment or decree, it is certainly proper that, during its pendency and before such final judgment or decree, the power to reopen it, to amend pleadings, to admit new testimony, and in general so to reform the cause as the interests of justice may require, should remain unimpaired. But the same principle that provides that, when a judgment or decree has been affirmed on appeal, or has been entered in pursuance of the mandate of an appellate court, such judgment or decree should not be in any manner interfered with, except with the permission of the appellate tribunal, requires also that only by the per-

mission of the appellate tribunal may interlocutory orders so affirmed or entered be thereafter vacated. In both cases alike the judgment, order, or decree sought to be vacated has become the act of the appellate court, and should not be disturbed without the action or permission of the appellate court.

We have searched in vain in the English Chancery Reports for any case in which a different course has been pursued, or where a lower court has attempted to reopen a cause in derogation of the ruling of an appellate tribunal; nor has our attention been directed to any adjudication in this country wherein there has been any different procedure.

From what we have said, it follows necessarily, in our opinion, that the Supreme Court of the District was without authority to make the order for the reopening of this cause from which the present appeal has been allowed and prosecuted.

But it is suggested in argument on behalf of the appellee, on whose motion the order in question was made, that, upon the showing made, this court may now give leave for the reopening of the cause, and permit or authorize the court below to proceed therewith upon such leave. This would be virtually to sanction what the court has done without authority, and to dispense with the necessity of application to this court in the first instance. But assuming that, for the saving of time and trouble, the suggestion may be taken as the equivalent of a formal application to this court, we are led to a consideration of the sufficiency of the showing made by the appellee.

As already stated, the appellee has applied for the reopening of the cause, and for permission to amend its answer and to introduce new testimony; and two grounds are stated for this application: (1) That there was fraudulent concealment by the appellant Farrow from the appellee of the existence of a patent, known as the Stover and Hance patent, which is assumed to dominate the invention of the appellant, and in fact to preclude him from the merit of being an original inventor; (2) that, until the rendition of the decision of this court on the former appeal, which was the appeal of the defendant now seeking to reopen the cause, the appellee was

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under a misapprehension as to the nature and character of the suit and of the complainant's claim. In support of its application, the appellee filed in the court below numerous letters and three several affidavits; and these we also may here consider.

We fail to find in the showing made any sufficient evidence, or indeed any evidence whatever, of fraudulent concealment by the complainant in the cause. It is stated that the complainant represented himself to be the original inventor of the device purchased from him by the appellee, when in fact he was not such inventor. He represented the same thing to the Patent Office in his application for a patent; and we fail to see that there was anything fraudulent in the representation. All applicants for patents do that, and are required so to do; and it is no evidence of fraud that anticipation of the invention might be developed in the course of the proceedings. There was only an application pending. The record of the present case, and the correspondence now for the first time introduced by the appellee, show quite conclusively that the president of the defendant company, who made the contract with the complainant which is the basis of the suit, was as eager to purchase the device as the complainant was to sell. He was evidently familiar with the patent law, and knew precisely what contingencies might arise and what risks he took, and he took the risks knowingly and deliberately. He took the risk, which was specifically pointed out, that there might be a declaration of interference with other parties, and that in such interference the complainant, and the defendant as the assignee of the complainant, might be defeated.

But this whole question of the originality of the invention by the complainant, which enters into the consideration for the contract, has already been litigated. It is not new. It is set up in the defendant's answer to the bill of complaint; and we fail to see wherein it acquires any additional force by reiteration in the application for the reopening of the cause.

The main specification of fraudulent concealment, how-

ever, is the allegation that, at the time the verbal contract between the parties was entered into which subsequently was embodied in the written agreement on which the litigation is based, the complainant had knowledge of the patent designated as the Stover and Hance patent, already mentioned, and even had a copy of it in his possession, and did not disclose it to the appellee. But an examination of the record shows very conclusively that he did disclose this patent to the attorney of the appellee charged with the making of an examination of the records of the Patent Office preliminary to the execution of the contract, that he delivered his copy of the patent to this attorney, and that the attorney actually examined the patent before the contract was executed; and that the contract was not executed until after full and satisfactory examination. Moreover, it is very clearly shown that, soon after the execution of the contract, the attorney of the defendant company sent to its president a copy of the Stover and Hance patent; so that the company had full knowledge of the patent at the time of the institution of the suit and, therefore, necessarily at the time when it made its answer to the bill of complaint. If there had been any fraudulent concealment of this patent by the appellee, then was the time to set it up. And yet neither in the appellee's answer to the bill of complaint, nor in the introduction of testimony, is there any reliance whatever on this patent, or on its alleged fraudulent concealment by the complainant, as a defense. It is too late to make any such defense now, even if it were well founded.

It is set forth, in the second place, as a reason for the reopening of the case, that, until the decision rendered by this court, the appellee company was under a misapprehension as to the nature and character of the complainant's claim. But this ground is wholly untenable. We fail to find any foundation whatever for it, either in the facts of the case or in law. It had the bill of complaint before it. It filed a sworn answer. It was represented by two or more attorneys. Its president and its attorney for the procurement of patents were examined as witnesses. The company had the most

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ample opportunity to understand the case, and we see no reason to doubt that it did understand it.

In this connection there has been some intimation in argument, that the opinion of this court on the former appeal went beyond the order appealed from, and is broader in its conclusions. We fail to find anything in the opinion which warrants this argument. But, if there be in it anything of that character, it is a well-known rule of construction that the expressions contained in an opinion are to be construed with reference to the subject-matter under consideration. The order of the court below was specific. We expressly affirmed that order, and we remanded the cause for the taking of the account directed by the order. Our mandate did not go beyond that. The cause went back to the court below for the execution of its order affirmed by this court on appeal. The account to be taken is the same account that was directed in the first instance by the court below. There is no ground for misunderstanding in the matter. No more and no less is directed to be done than was directed by the court below in the order of reference made by it to the auditor.

It is our conclusion that the order of the Supreme Court of the District of Columbia of October 22, 1900, whereby it allowed the cause to be reopened, the defendant's answer to be amended, and further testimony to be taken, and from which the present appeal has been allowed, was made without authority of law, and that it should be *reversed, with costs; and that the cause should be remanded to that court, with directions to proceed with the audit heretofore directed to be had, and for such other proceedings according to law as may be just and proper. And it is so ordered.*

A motion for a rehearing was overruled.

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THE UNITED STATES, EX REL. BRIDE,
v.
MACFARLAND.

TAXATION; TAX SALE CERTIFICATE; ESTOPPEL; STATUTORY CONSTRUCTION.

1. A writ of *mandamus* will not lie to compel the Commissioners of this District to execute and deliver to the petitioner, the assignee of a tax sale certificate, a deed conveying to him a certain lot, without the payment of arrears of taxes due thereon, where the lot was sold and the certificate issued to petitioner's assignor in April, 1898, and the certificate recited that the sale was made in accordance with the provisions of the act of Congress of February 28, 1898, and that it was issued "subject to the payment of all arrears of taxes before the issue of the deed," as required by that act, although the levy or assessment of the taxes for which the sale was made was under the act of Congress of March 3, 1877, and the amendments thereto, which contained no such provision as to payment by the purchaser of arrears of taxes as a condition precedent to the execution and delivery to him of a deed.
2. Where the later of two statutes, which are not in express terms repugnant, covers the whole subject of the first, and embraces new provisions plainly showing that it was intended as a substitute, it will operate to repeal the earlier statute, the presumption being that it was not the intention of the legislature that two or more acts relating to and covering the same subject-matter should remain in force together; but all such acts being in *pari materia* must be construed together in order to arrive at the legislative intent.
3. The office of the proviso of a statute is, generally, intended to restrain the enacting clause, and to except something which would otherwise have been within it, or in some measure to modify the enacting clause.

No. 1046. Submitted March 8, 1901. Decided April 2, 1901.

HEARING on an appeal by the relator from an order of the Supreme Court of the District of Columbia dismissing a petition for a writ of *mandamus* to compel the Commission-

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Statement of the Case.

ers of the District of Columbia to execute and deliver to the petitioner a deed of property purchased at a tax sale. *Affirmed.*

The COURT in its opinion stated the case as follows:

This appeal is from an order of the Supreme Court of the District of Columbia refusing the writ of *mandamus* to the Commissioners of said District, requiring them to execute a deed for lot No. 9, with improvements, in square 31, in Washington city, sold at a tax sale, and to which deed the relator alleges himself entitled as assignee.

The facts of the case are undisputed, and they appear to be simply these, as disclosed by the petition and answer:

On April 6, 1898, the collector of taxes of the District of Columbia sold at public auction at his office, in pursuance of a public notice by advertisement, duly published, and in accordance with the provisions of an act of Congress entitled "An Act in relation to taxes and tax sales in the District of Columbia," approved February 28, 1898, lot 9, with improvements, in square 31, to Robert Y. Slater; and thereafter, on the 20th of April, 1898, issued a certificate of sale to the purchaser. This certificate recites that the lot was sold after advertisement, in accordance with the provisions of the act of Congress approved February 28, 1898, and that it was issued "subject to the payment of all arrears of taxes before the issue of the deed," as required by the provisions of said act. This certificate was received and accepted by Slater, the purchaser, who thereafter undertook to assign the same to J. W. Thompson, said Thompson thereafter undertaking to assign the same to Cotter T. Bride, the person on whose relation this proceeding was instituted.

More than two years having elapsed since said sale, and said property not having been redeemed, as prescribed by the provisions of said act of Congress, Cotter T. Bride applied to the Commissioners of the District for a tax deed. The Commissioners refused to execute and deliver the deed unless the petitioner, the assignee, should pay all taxes as-

assessed against said property, according to law, including taxes for the year for which said lot had been sold and bought in by the District of Columbia, which remained unpaid. The petitioner declined to pay such taxes, and thereupon filed a petition for a *mandamus* against the Commissioners, to require them to execute and deliver a deed conveying to him a title in fee-simple to said lot, without such payment of prior taxes due thereon.

There was filed with the petition, as exhibits, the tax certificate, the deed which the petitioner tendered for execution, and a notice from the Commissioners to the petitioner that they were willing to execute the deed, provided the arrearages of taxes should be first paid.

The Commissioners, in their answer, while not controverting the facts as stated in the petition, aver that their demand and requirement, as a condition precedent to the right of the petitioner to receive the deed, is based upon the provision of the act of Congress of February 28, 1898, under which, as they allege, the sale was made; that provision declaring that no deed shall be issued until all taxes and assessments appearing upon the tax books against the property are paid, with penalties, etc.

Upon this state of facts, the court below overruled a motion for a peremptory writ of *mandamus*, discharged the rule to show cause, and dismissed the petition; and it is from this order that the appeal is taken.

Mr. O. B. Hallam and *Mr. W. M. Hallam* for the appellant:

The sole question that arises is whether the rights of the parties are to be governed or determined by the act of March 3, 1877, or that of February 28, 1898. We claim that the act last named is so manifestly *in futuro*, and relates, by its language, so clearly to taxes thereafter in arrears that there can be no construction given it that will apply it to taxes already in arrears. That is to say, giving it its utmost effect as authorized by its language, it could only

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reach taxes in arrears for the fiscal year ending June 30, 1898.

All rules of construction of statutes necessitate the court's ruling that the opening clause of this act or statute make a limitation of all subsequent provisions to the class of sales referred to in that opening clause. In other words, that it cannot be properly held that the proviso applies to sales made for taxes already in arrears at the date of the passage of the act. *Sutherland on Stat. Construc.*, Secs. 268, 325, 362, 463; *Parlington v. Attorney-General*, L. R. 4 H. L. Cases, 122; *Larrabee v. Talbott*, 5 Gill (Md.), 426; 46 Am. Dec. 637; 23 Am. & Eng. Encyc. of Law (1st ed.), p. 218, n. 2; *Potter's Dwaris*, 221; 23 Am. & Eng. Encyc. of Law (1st ed.), p. 447, n. 2; 23 Am. & Eng. Encyc. of Law (1st ed.), p. 448; *U. S. v. Crawford*, 6 Mackey (D. C.).

The opinion in the last-named case, we are aware, has, to some extent, been inferentially overruled by this court in *Chase v. U. S.*, 7 App. D. C., but not for reasons conflicting with the general doctrine laid down; which seems to be in harmony with that laid down in the sections in *Mr. Sutherland's* work, above cited. See, also, *Gilbert v. Morgan*, 18 D. C. 296; *King v. D. C.*, MacA. & M. (D. C.) 36.

Mr. Andrew B. Duvall, Attorney for the District of Columbia, and *Mr. Clarence A. Brandenburg*, assistant attorney, for the appellees.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

The levy or assessment of the taxes for which the sale was made was under the act of Congress of March 3, 1877, and the amendments thereto, and was duly listed and published as required by that act; and the whole question in this case is, whether the sale for the arrearages of taxes so assessed and listed and published, was made under the act of March 3, 1877, or under the subsequent act of Congress of February 28, 1898, relating to taxes and tax sales in the District of Columbia; the prior act of 1877 not requiring, as does the

act of the 28th of February, 1898, the purchaser at the sale to pay the prior arrearages of taxes as a condition upon which he may be entitled to receive a deed.

By the act of March 3, 1877, and the amendments thereof, full provision was made for listing, advertising and sale of property of delinquent taxpayers; and under that law the property in question was duly assessed and listed, and publication made, as thereby directed, for the taxes due for the fiscal year ending June 30, 1897.

Subsequently, Congress, by the act of February 28, 1898, entitled "An act in relation to taxes and tax sales in the District of Columbia," provided a full and complete system for the listing, advertising, and sale of property of delinquent taxpayers, incorporating therein most of the material parts of the pre-existing law, but with some modifications and additions thereto, and thereby provided for the sale of all property of delinquent taxpayers. And by the eighth section of this latter act of 1898, it is declared "that this act shall take effect from and after its passage; and all acts or parts of acts inconsistent herewith be, and the same are hereby, repealed." As already stated, this act was approved February 28, 1898.

It is argued by the appellant that though the sale was made on the 6th of April, 1898, after the passage of the act of the 28th of February, 1898, the terms of the first section of the act of 1898 are that the assessors of the District of Columbia shall prepare a list of all taxes on real property in said District subject to taxation, on which said taxes are levied and in arrears, on the first day of July, of each year *hereafter*; and that, therefore, by its terms, the act does not and could not apply to the assessment and listing of the taxes due for the fiscal year ending June 30, 1897; and, consequently, the tax sale of the 6th of April, 1898, was not provided for, and is not within the provisions of the act of 1898. But if this contention were conceded, the tax sale in question would be simply a nullity, for the want of power to make it, unless it could be shown that the act of Congress of March 3, 1877, still remained in force and operation at

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the time of the sale on the 6th of April, 1898, notwithstanding the act of February 28, 1898. But this contention of the appellant, we think, is not well founded for several reasons.

In the first place, the act of 1898 is intended as a general comprehensive system of procedure for the listing, advertising, and sale of property for taxes. It is not intended to be a mere auxiliary method prescribed to a pre-existing method. It was intended to take the place of a system previously prescribed in which it was supposed there were defects that required legislative change in detail, but not in the system itself. The act of February 28, 1898, embodied nearly all the provisions of the pre-existing acts upon the subject, with certain additions and modifications. It was intended to take the place of the system that had prevailed with the additions and modifications made thereto; and that being the case, it plainly comes within the principle that where two acts, though not in express terms repugnant, yet if the later act covers the whole subject of the first *and embraces new provisions*, plainly showing that it was intended as a substitute for the first, it will operate as a repeal of that act; the presumption being that it was not the intention of the legislature that two or more acts relating to and covering the same subject-matter should remain in force together. *District of Columbia v. Hutton*, 143 U. S. 18. But all such acts being in *pari materia* must be construed together, in order to arrive at the legislative intent. "Where," as said by Lord Mansfield, in *Rex v. Loxdale*, 1 Burr. 445, 447, "there are different statutes in *pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and *construed together*, as one system, and as explanatory of each other." See, also, the case of *Rogers v. Bradshaw*, 20 Johns. 735, 744.

The act of February 28, 1898, was, manifestly, intended by Congress simply as a substitute for all preceding legislation upon the subject of the method of proceeding for the collection of taxes and of making tax sales of the property of delinquent taxpayers. It was clearly not the intention of

Congress, in passing the act of 1898, to strike down and nullify all that had been done under the act of 1877 and its supplements, as preliminary to proceeding to sale of the property upon which the taxes were due prior to the passage of the act of February 28, 1898. Congress, by the passage of the latter act, did not certainly intend to deprive the District of all remedy for the collection of taxes due prior to the date of the act of 1898. The latter act, therefore, was simply a re-enactment of pre-existing laws with modifications and enlargement of powers to make them more effective. But, in doing this, it did not in any manner nullify what had been done under the pre-existing acts upon the subject. The act of 1898 became applicable to the proceeding that had taken place under the act of 1877 and its supplements, as if it had taken place under the act of 1898, and the remedy thereby was made a continuing one; and though the prior acts of Congress upon the subject were in effect repealed, the proceedings commenced under the prior acts were authorized to be pursued and perfected under the last act upon the subject, that of 1898.

The terms of the first clause of the first section of the act of 1898 might, if they stood alone, admit of some questionable construction. But that clause of the statute must be construed in the light of and in connection with all the other provisions of the statute, as construed in *pari materia* with the provisions of former statutes. Section 3 of the act of 1898 contains several *provisos*; the first of which is "that no deed shall be issued until all taxes and assessments appearing upon the tax books against the property are paid, with penalties, interest and costs, including taxes for the years for which the District purchased the property at tax sale."

It is a well-settled principle, that the office of a *proviso* in a statute is, generally, intended to restrain the enacting clause, and to except something which would otherwise have been within it, or in some measure to modify the enacting clause. *Voorhees v. Bank U. S.*, 10 Pet. 449, 471; *Wayman v. Southard*, 10 Wheat. 1, 30.

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But, without making any special application of this principle, we think, in this case, there is no ground for the mandamus. The sale of the property to Slater was professedly made under the act of February 28, 1898, and he dealt for it as having been rightfully sold under that act. The certificate which was given to the purchaser, Slater, expressly recites that the sale was made in accordance with the provisions of the act of February 28, 1898, and was made subject to the payment of all arrears of taxes before the deed was demandable. The certificate was accepted by the purchaser without question or protest, and neither he nor his assignees made any objection thereto until after the lapse of more than two years, when the assignee sought to obtain a deed for the property from the Commissioners, without the payment of the prior arrearages of taxes. Under such circumstances, clearly, no question can be made by the purchaser of the property, or his assignee, as to the authority under which the sale was made; and by making such question avoid the liability under which the party to whom the sale was made and the certificate given was enabled to become the purchaser. His liability for the arrearages of taxes due upon the property was a material part of the consideration for which the certificate of purchase was issued; and no assignee is entitled to stand in a better situation in respect to the rights under that certificate than the original purchaser.

In no view of the case, therefore, was the relator entitled to the writ of mandamus, and the court below was right in refusing the writ, and in dismissing the application therefor. The order appealed from is, therefore, affirmed, and it is so ordered.

Order affirmed.

MIEHLE v. READ.

PATENTS; BURDEN OF PROOF; DILIGENCE; AMENDMENT.

1. The party to an interference who was first to file his application is to be regarded as the senior applicant, although while it was pending his rival's application went to patent.
2. Where it is shown that one of the parties to an interference conceived the invention in June, but did nothing until after his rival entered the field and filed an application in the following December, his only excuse being that he was engaged in other things which required his attention, while a two hours' conference with his attorney would have sufficed to have prepared his application for filing, and it also appears that he had had experience in patent matters and was not without means to prosecute his invention, such lack of diligence is shown as to defeat his claim to priority in an interference proceeding.
3. The rights of a party to an interference become fixed by the filing of his application in the Patent Office, and lack of diligence on his part in prosecuting his application in the Office has no bearing upon the question of priority.
4. Where one of the parties to an interference appears to have so changed his claims as to cover an invention which he did not contemplate until after he saw his rival's patent, *quære*, whether (in view of *Bechman v. Wood*, 15 App. D. C. 484) he is entitled to make the claims in issue.

No. 158 Patent Appeals. Submitted March 13, 1901. Decided April 2, 1901.

HEARING on an appeal from a decision of the Commissioner of Patents in an interference case. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. Elliott & Hopkins, A. E. Dowell and J. J. Darlington for the appellant.

Messrs. Philipp, Sawyer, Rice & Kennedy for the appellee.

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Mr. Justice MORRIS delivered the opinion of the Court:

This is an appeal from the decision of the Commissioner of Patents in an interference case.

As stated in the appellant's specification, the invention here in controversy "relates to that class of mechanical movements employed for transforming a rotary movement with rectilinear or reciprocating movement" with special reference to the use of such motion in the beds of printing-presses. The object of the invention is "to convert the rotary movement of a driving-shaft into rectilinear or reciprocating movement in the type-bed or part to be reciprocated, and in doing so to carry the bed back and forth throughout the greater part of its travel with a uniform movement and as the bed approaches the limit of its traverse in either direction to decrease the motion gradually until it is absolutely arrested, and then start the bed on its return movement and increase as gradually the motion from a point of rest to the full maximum speed."

The claims in issue are nine in number, not greatly different from each other, and all of the same general character; and they are as follows:

"1. The combination with the part to be reciprocated and means for reciprocating said part throughout the greater part of its movement, of a bodily revolving lever also rotating on an independent axis in the opposite direction of its bodily travel, and means in connection with said part to be reciprocated for engagement with said lever.

"2. The combination with the part to be reciprocated and means for reciprocating said part throughout the greater portion of its movement, of a bodily revolving lever also rotating on an independent axis in the opposite direction of its bodily travel, and means at each end of said part to be reciprocated for engagement with said lever.

"3. The combination with the part to be reciprocated and means for reciprocating said part throughout the greater portion of its movement, of a bodily revoluble lever rotatable on an independent axis and comprising a toothed portion

forming a pinion, a second toothed portion engaging with said pinion and causing the same to rotate, and means in connection with said part to be reciprocated for engaging with said lever.

" 4. The combination with the part to be reciprocated and means for reciprocating said part throughout the greater portion of its movement, of a bodily revoluble lever rotatable on an independent axis and comprising a pinion, a non-rotative toothed portion engaging with said pinion and causing the latter to rotate, and means in connection with said part to be reciprocated for engagement with said lever.

" 5. The combination with the part to be reciprocated and means for reciprocating said part throughout the greater portion of its movement, of a bodily revoluble lever, rotatable on an independent axis and comprising a pinion, an internal gear surrounding said pinion and meshing therewith, whereby said lever is rotated in the opposite direction of its bodily travel, and means in connection with said part to be reciprocated for engagement with said lever.

" 6. The combination with the part to be reciprocated and means for reciprocating said part throughout the greater portion of its movement, of a bodily revoluble lever rotatable on an independent axis and comprising a pinion, an internal nonrotative gear surrounding said pinion and causing said lever to rotate, and means in connection with said part to be reciprocated for engagement with said lever.

" 7. The combination with the part to be reciprocated and means for reciprocating said part throughout the greater portion of its movement, of a rotating member, a lever pivoted eccentrically to be carried by said member, a nonrotative gear, said lever comprising a pinion engaging with said gear and causing the rotation of said lever, and means in connection with said part to be reciprocated adapted to engage said lever.

" 8. The combination with the part to be reciprocated and means for reciprocating said part throughout the greater portion of its movement, of a rotating member, a shaft secured eccentrically to and supported by said rotating member and

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a pinion and an actuating member mounted on said shaft and constituting a lever, a nonrotative gear engaging with said pinion, and means carried by said part to be reciprocated for engaging with said actuating gear.

"9. The combination with the part to be reciprocated and means for reciprocating said part throughout the greater portion of its movement, of a bodily revolving lever also rotating on an independent axis in the opposite direction of its bodily travel, an abutment in connection with said part to be reciprocated for engagement with said lever, and means for holding said lever in engagement with said abutment."

These nine claims are taken *verbatim* from a patent issued to the appellant Robert Miehle on May 25, 1897, on an application filed by him on September 3, 1896, and comprise nine of the twenty-one claims therein contained.

The appellee, George F. Read, had filed his application on December 7, 1895, nearly nine months before that of Miehle reached the Patent Office; but for some reason it was delayed in the Office, and Miehle's application was permitted to go to a patent before being put in interference with it. Notwithstanding, therefore, that Miehle has a patent, Read was the senior applicant, and entitled to all the advantages which his earlier application gives him. Read's specification included twelve claims, six of which were subsequently canceled. All these claims, besides other features differentiating them from the claims now in controversy, contemplated the use of a crank-pin as the thing to be reciprocated in the mechanism. Afterward, on September 15, 1897, upward of three months after the issue of the patent to Miehle, Read copied and added to his own specification and claims nine out of the twenty-one claims of that patent, which constitute the issue in this case, for the purpose of procuring the present interference, which was accordingly declared. Thereupon the parties filed their preliminary statements.

Read, in his statement, says that he conceived the invention on or about September 15, 1895, made drawings of it

and disclosed it to others about the same time, made no model of it, but caused a working printing-press embodying the invention to be commenced about October 10, 1895, completed during the month of November of 1895, and to be operated on or about December 2, 1895, and at various later dates. The invention was not put into commercial use. As already stated, he filed his application on December 7, 1895.

Miehle, in his preliminary statement, says that he conceived the invention in or about the month of April, 1895; that in the same month and during the following summer he made drawings of it and explained it to others; that in or about the month of May, 1896, he made a model of it, which he explained to others; but that he had not reduced his invention to practice otherwise than by the filing of his application (September 3, 1896).

When the cause came to a hearing after testimony taken, all three of the tribunals of the Patent Office concurred unanimously in holding that Miehle had shown by the evidence a conception of the invention by him as early as June, 1895; that he was, therefore, the first to conceive the invention, since Read claimed no earlier day than September 15, 1895, for the date of his conception; but that, as Miehle admitted that he had never reduced the invention to practice before the filing of his application, and as Read was the first to file his application, the latter was entitled to be regarded as the first to reduce to practice, and, therefore, as entitled to judgment of priority of invention, unless it appeared that, at the time of the filing of Read's application, Miehle was in the exercise of due diligence in the prosecution of his invention. They all found that Miehle was not diligent; and consequently they all awarded judgment of priority of invention in favor of Read.

From the decision of the Commissioner to this effect Miehle has now appealed to this court.

Assuming that the device of Miehle and the device of Read are the same in effect and in contemplation of the patent law, and that there is here interference in fact, we have no doubt that the decision of the Commissioner is en-

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tirely correct. Due allowance is made to Miehle of priority of conception. It is considered, and we do not understand that it is contested by the appellee, that Miehle had a conception of the invention at least as early as June of 1895, which is upwards of three months earlier than the date claimed by Read for his own conception of it. But it does not appear that Miehle did anything whatever after that and before Read entered the field, conceived the invention, reduced it to practice, and filed his application in the Patent Office. Read was prompt and diligent enough in these steps; but there is an effort on the part of the appellant to show that he was not diligent in the prosecution of his application in the Office, and that he permitted it to lag unduly. It is not apparent, however, that this want of diligence, if such there was, on the part of Read, has any bearing on the present controversy. His rights, whatever they were, became fixed by the filing of his application; and they could not be lost and become vested in others by mere delay on his part in their prosecution.

But that there was delay on Miehle's part, which, under the circumstances, amounted to a want of due diligence, is quite apparent. After his disclosure of the invention in June of 1895, the record does not show that he took any steps whatever to reduce it to practice, either actual or constructive, until after the appellee had done everything that was required to perfect his title to the invention. The only excuse sought to be given for the delay is that he was engaged in other things which required his attention. But it appears that the requirement of due diligence in this case would have been subserved by a conference of less than two hours with his attorney. This was all the attention that appears to have been subsequently given to the matter before the filing of his application; and assuredly this amount of attention could have been given without difficulty, if it was desired to prosecute the matter earnestly, within the time between June and December of 1895. Miehle was not unacquainted with the requirements of the patent law in this regard, for he had taken out other patents; and he had not

the excuse that he was attempting to perfect his invention, or that he was without means to prosecute it.

We fully concur with the tribunals of the Patent Office in the conclusion reached by them in this regard.

But it is proper for us to say that we are not satisfied that the appellee Read is entitled to make the claims here in issue, in view of the decision of this court in the case of *Bechman v. Wood*, 15 App. D. C. 484. The several devices of the parties, as outlined in their original claims and specifications, do not seem to us to be the same. An essential feature of Read's device is the use of a crank-pin; while Miehle's device is conspicuous by the absence of any crank-pin or any need of one. It is true that, when Read sought to amend his application by taking Miehle's claims for the purpose of this interference, he expressly disclaimed the necessity of a crank-pin as an integral part of his device; but, all the same, it appears everywhere through the original specification, and the disclaimer is merely for the purpose of broadening the claims and taking in a form of the device of which he does not seem to have been aware before he saw the Miehle patent. We do not think that the two devices are one and the same in contemplation of law, or that they are mechanical equivalents of each other, merely because they both effect the same purpose of a reciprocating mechanical movement. We are not sure that either party is entitled to the broad claims of the present issue in view of the circumstances of the case. We do not desire to be understood as expressing any opinion on the subject. At the same time we do not desire to be understood as concurring in the opinion of the Patent Office that the original claims of the appellee Read are substantially the same as the claims of the present issue. But, as Miehle, although the junior applicant, has a patent for the devices in issue, it seems to be no more than just that Read should be placed on a position of equality with him, whereby they may both be better enabled to test in some appropriate proceeding the question of actual interference between themselves, if they so desire.

The decision of the Commissioner of Patents, awarding

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judgment of priority of invention to the appellee Read, is affirmed.

The clerk of the court will certify this opinion and the proceedings in this court to the Commissioner of Patents according to law.

EASTMAN v. HOUSTON.

PATENTS; INTERFERENCE; DISCLOSURE; ABANDONED EXPERIMENT.

The testimony in an interference case involving a photographic roll-holder reviewed, and it appearing that the senior applicant claiming prior conception and disclosure failed to show disclosure, except by the testimony of witnesses who, testifying four years after the event, claimed to have seen the roller-holder box, but not the interior of the box, and a drawing, while no one of them was shown to have any acquaintance with the photographic art or with any branch of it, or to have had any intelligent comprehension of the thing exhibited, and no means of fixing the time, and the applicant himself was the only one who testified as to the identity of the contents of the box; and it further appearing that the applicant, an inventor and patent attorney, and with abundant means, suppressed his invention and concealed the device for more than four years after he claimed to have reduced it to practice and produced it only after an interview with the attorney of his rival, it was held, reversing a decision of the Commissioner of Patents, awarding him priority, (1) that there was no disclosure, in the sense of the patent law, which must be made ordinarily to persons competent to understand and appreciate the alleged invention; and (2) that the presumption was that there was nothing more than an abandoned experiment.

No. 178. Patent Appeals. Submitted March 15, 1901. Decided April 2, 1901.

HEARING on an appeal from a decision of the Commissioner of Patents, in an interference case. *Reversed.*

The facts are sufficiently stated in the opinion.

Mr. Frederick F. Church and *Mr. Moritz B. Philipp* for the appellant.

Mr. William N. Moore and *Mr. Phillips Abbott* for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

This is an appeal from the decision of the Commissioner of Patents in an interference case.

The matter in controversy is stated as follows by the proper officers of the Patent Office:

"A photographic roll-holder consisting of a casing having a front opening, a film-support provided with an observation aperture therein, winding and supply chambers located in the rear of said support, winding and supply spools arranged in said chamber and spool-centering devices for said spools."

The appellee, David H. Houston, is the senior applicant: he filed his application on March 12, 1897. In his preliminary statement he says that he conceived the invention in November, 1892; that he made drawings of it in January, 1893; that he made a working roll-holder in the spring of 1893; and that he disclosed the invention to others in November of 1894. He does not appear to have made any effort to place it upon the market for sale or public use.

The appellant, George Eastman, who filed his application on August 23, 1897, alleges in his preliminary statement that he conceived the invention about December 1, 1895; that he made sketches of it and explained it to others about December 5, 1895; that the construction of a full-sized roller-holder was commenced soon thereafter and completed on or about January 23, 1896; and that about 5,000 of such roller-holders had been made and sold.

Upon the testimony the examiner of interferences found in favor of Eastman, the board of examiners and the Commissioner of Patents in favor of Houston; and from the decision of the Commissioner the case comes to us on appeal by Eastman.

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The burden of proof is upon Eastman as the junior applicant. This he has sufficiently and satisfactorily borne so far as to show the substantial correctness of the allegations of his preliminary statement. So all the tribunals of the Patent Office have held; and, in fact, there seems to be no effort, either in the testimony or in argument on behalf of the appellee, to disprove Eastman's case otherwise than by showing anticipation of the invention by Houston in 1892 and 1893. Consequently it becomes wholly unnecessary for us to analyze or examine the testimony on behalf of Eastman.

Houston, the appellee, claims to have conceived the invention and fully reduced it to practice by the construction of a working machine in the years 1892 and 1893, and to have disclosed his invention to others in November of 1894. Of course, if he proves these facts, he must prevail: for these long antedate Eastman's conception. If he does not prove them, he fails: for he shows nothing else whatever done by him before the filing of his application for a patent, which was subsequent to the conception and reduction to practice by Eastman. The issue between the parties is, therefore, very sharply defined.

As evidence of his action, Houston has produced and introduced in evidence a sketch in lead-pencil, on which is written the date of January 8, 1893, which is designated in the testimony as "Exhibit A," and which is assumed to show the invention in controversy; and also a roller-holder box, designated in the record as "Exhibit B," which embodies the invention, and which is the identical full-sized machine claimed to have been made by him in the spring of 1893. This roller-holder he testified to have used three times, once in 1893, once again in 1895, and the third time in 1897, to take impressions, which, however, were not satisfactory and were thrown away. It was not *loaded*, as the expression is, that is, with the roller inserted ready for use, at any other time; and he never made any other machine. The reduction to practice which is claimed was by the construction of this one box in 1893. We agree with the Commissioner that it is a sufficient reduction to practice under the decisions in

the cases of *Coffee v. Guerrant*, 68 O. G. 279; 3 App. D. C. 497, and *Mason v. Hepburn*, 84 O. G. 147; 13 App. D. C. 86, if the construction of the roller-holder substantially as it now exists is sufficiently shown to have been accomplished at the time designated.

To prove disclosure of the invention by him in the years 1894 and 1895, and the possession by him at that time of the sketch "Exhibit A" and the roller-holder "Exhibit B," Houston has adduced the testimony of seven witnesses; and upon the degree of credibility to be attributed to this testimony and upon the materiality of what it shows depends the determination of the cause. It was accepted as sufficient by the board of examiners in the Patent Office and by the Commissioner of Patents; but we think that in this there was error. We concur with the examiner of interferences that it should be rejected.

It would probably serve no good purpose for us to analyze this testimony in detail, especially as it has been well and ably done by the examiner. We need only note some general features of it, bearing in mind at the same time the fact that Houston himself, although living at the time of his alleged invention and afterward on a farm near the town of Hunter, in the State of North Dakota, and engaged in farming, had been, and was then, and continued thereafter to be interested in the photograph business, had taken out several patents in connection with the art, apparently took out a patent in the years 1895-1896, became involved in litigation over one of his patents of this kind with the company with which the appellant was connected, and was or had been himself a solicitor of patents, well acquainted with the patent business. There is also the fact to be noted, as disclosed by the record, that there were during the taking of the testimony of these witnesses frequent interruptions of the cross-examination and apparent "coaching" of the witnesses by Houston, some of it possibly justifiable, but on the whole tending to throw discredit on the testimony.

Of the seven witnesses the first was a dealer in farm implements, who had been foreman on Houston's farm; the second

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was a workman on the farm, who occasionally acted as foreman; the third was a blacksmith and wagon-maker in the town of Hunter; the fifth was a farmer who lived in the neighborhood; the sixth was a milliner, who was employed in Houston's family in 1893, and again in 1894; and the seventh was a paper-hanger in the town of Hunter. No one of them is shown to have had any acquaintance whatever of any kind with the photographic art or with any branch of it, or to have had any intelligent comprehension of the thing which was exhibited to them. These are the persons to whom disclosure of this invention is claimed to have been made. They, each and all, testify to seeing, either the drawing "Exhibit A," or the roller-holder box "Exhibit B," or both of them, in Houston's parlor in the house in North Dakota in the year 1894 or 1895 — one says in December of 1894, another says in the spring or summer of 1894, another in the fall of 1894, and others in the year 1895. They adhere to these dates with remarkable pertinacity, notwithstanding that they had no means whatever for fixing them and can give no satisfactory reason for such dates, had no interest in the subject-matter, and knew nothing whatever about it, and had, after the lapse of four or five years, nothing but their unaided memories whereby to fix the time. The extreme improbability of all this is perfectly apparent.

But if, by a stretch of the imagination, we assume that these witnesses were correct in their dates and correct in stating what they saw, yet no one of them testifies that the invention was explained to him, or that he knew anything about it, except, as one says, that it was something new, or, as another says, that it was something for taking pictures. No one can testify why it was exhibited to him, or what was said when he was called upon to see it. No one saw the interior of the roller-holder box, and no one knew what it contained. And one witness says that he was told not to tell any one "because they might get his invention."

Now, it is very plain that there was here no disclosure of the invention in the sense of the patent law. Even Houston himself, in his deposition, fails to show that he dis-

~~closed the invention~~ to any one. Of course, if it be the fact that the roller-holder, as it now stands, contains the invention, and if it were satisfactorily shown that it is now precisely in the same condition as it was at the time at which these witnesses claim to have seen it in the year 1894 or 1895, it might be assumed that there was sufficient disclosure. But no one testifies to the fact of identity of the contents of the box, except Houston himself, and his testimony cannot be accepted as sufficient to establish the fact. Disclosure, in the sense of the patent law, must be made ordinarily to persons competent to understand and appreciate the alleged invention. Otherwise, there is no true disclosure. We are unable to find in the record any sufficient or satisfactory disclosure of the invention by the appellee at any time before he came into the Patent Office with his application for a patent. The only proof that he had the invention at any time before the date of that application, or before the day on which the application was sworn to, is his own unaided testimony; and this, of course, cannot be accepted without corroboration. When it is remembered, also, that he was familiar with patents and the requirements of the patent law, and that he was himself a solicitor of patents, it is incredible that he should have regarded as a disclosure of his invention the exhibition which is claimed to have been made by him of the sketch "Exhibit A" and the roller-holder "Exhibit B" in the years 1894 and 1895.

Moreover, although stimulated, as he testifies, by an advertisement which appeared in a photographic publication issued in 1892, and which indicated a demand for the invention, he suppressed the invention and practically concealed his device for more than four years after the time at which he claims to have actually reduced it to practice; and he produced it at last only after an interview with the attorney for Eastman, in which the latter claims that there was a disclosure to him that Eastman had the invention in controversy. The filing of the application immediately after that interview, after it had been so long and without any cause assigned withheld from the public, is a very suspicious

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circumstance, of which no explanation is given. That Houston might have filed his application at any time during the four years which intervened between the spring of 1893 and March 12, 1897, if his own testimony is to be believed that he had the invention all the time, is perfectly plain. No reason whatever is given for his failure to do so. He had abundant means and ample opportunity to file his application; and yet he did nothing whatever until he found that there was a rival in the field who had actually reduced the invention to practice. What we said in the case of *Fefel v. Stocker*, 17 App. D. C. 317, is even more applicable in the present case than in that. There it was said:

“Long and unexplained delay in the application for a patent is always significant in such cases, especially when, as here, the parties in interest were actively engaged in the prosecution of other similar applications; and such delay raises a presumption which it is incumbent on the applicant to rebut by clear and satisfactory proof.”

The presumption in such cases is that there was nothing more than a mere abandoned experiment.

We are of opinion that there is no sufficient testimony to show that the appellee, Houston, had the invention in controversy at any time before the date of his application for a patent, March 12, 1897, when the appellant had already reduced it to practice upwards of twelve months before that day, and had placed the device upon the market. And consequently it follows that there should be judgment of priority of invention for the appellant, Eastman.

The decision of the Commissioner of Patents is *reversed*; and judgment of priority of invention is awarded to the appellant, George Eastman.

The clerk of the court will certify this opinion and the proceedings in the cause in this court to the Commissioner of Patents according to law.

HOWARD v. HEY.

PATENTS; REVERSIBLE ERROR; ABANDONED EXPERIMENT; REDUCTION TO PRACTICE.

1. A concurrence of decision by all the tribunals of the Patent Office adverse to an appellant to this court upon a matter of fact renders it necessary for him to make out a very clear case of error in order to obtain a reversal; *following* *Hisey v. Peters*, 6 App. D. C. 68; *Hien v. Buhoup*, 11 Id. 293; *Glenn v. Adams*, 12 Id. 175; *Esty v. Newton*, 14 Id. 50.
2. Where in an interference case involving priority of invention of a stamp-canceling machine, one of the parties to which filed his application February 17, 1890, and the other May 31, 1887, it appeared that the former, the junior applicant, completed and operated his machine upon letter mail in the Boston post-office for several days in 1883, and then after partly dismantling it, laid it aside and never again operated or tested it in public, while the testimony of two employees of the post-office, intended to show that it was successfully operated, was vague and indefinite, and the assignee of the junior applicant, who furnished the money for making the machine in 1883, although claiming to have subsequently employed another party merely to devise a new feeding device for the machine, caused applications covering the entire machine to be filed in the name of such other party, it was *held*, that the testimony did not show reduction to practice, but a mere abandoned experiment on the part of the junior applicant; *following* *Beals v. Finkenbiner*, 12 App. D. C. 23; *Warner v. Smith*, 13 Id. 111; *Traver v. Brown*, 14 Id. 34; *Esty v. Newton*, 14 Id. 50; *Fefel v. Stocker*, 17 Id. 317; *Reichenbach v. Kelley*, 17 Id. 333.

No. 171. Patent Appeals. Submitted March 14, 1901. Decided April 2, 1901.

HEARING on an appeal from a decision of the Commissioner of Patents in an interference case. *Affirmed.*

The facts are sufficiently stated in the opinion.

Mr. Fred E. Tasker for the appellant.

Mr. George W. Hey in proper person.

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Mr. Justice SHEPARD delivered the opinion of the Court:

Appellant, Elijah L. Howard, appeals from a decision of the assistant Commissioner of Patents awarding priority of invention to George W. Hey of a stamp-canceling machine, devised for use in post-offices.

The issue of interference is in the following terms:

“The combination with a letter-feeder, of a marking-roller, and an impression-roller, one of which is yieldingly mounted relatively to the other, and means for intermittently separating them when no letter is passing, and a device in the letter-path operated by the passing letter to render such separating means inoperative.”

The burden of proof was upon Howard, who filed application February 17, 1890, to overcome the priority of Hey acquired by filing his application nearly three years before, namely, May 31, 1887.

Howard introduced testimony tending to prove his allegations of conception of the invention of the issue in 1882, and its successful reduction to practice in February, 1883. He produced his original machine which the proof tended to show had been operated in the Boston post-office about February 20, 1883. Though lacking some of its parts, this machine showed the material features of the issue.

It appears that the assignees of Howard had filed several applications and obtained patents for stamp-canceling machines, between 1884 and 1890, in the name of Ethridge, the inventor, which machines embodied the chief features of the mechanism of Howard. Interferences had been declared between Hey and Ethridge in respect to some of these, resulting in dissolution of interference in one case and award of priority to Hey in another. Hey introduced copies of these records and some expert evidence relating to the condition of the Howard machine when produced and offered in evidence. In respect of his own invention, of which he had alleged conception in February, 1884, and reduction in December, 1885, he introduced no evidence, but stood upon the date of his application.

The case was, therefore, made to turn upon the sufficiency of Howard's evidence to establish the successful reduction to practice of his machine by its use for some days in the Boston post-office in February, 1883.

Each tribunal of the Patent Office in succession held this evidence insufficient, and, therefore, awarded priority to Hey.

The first stamp-canceling machine of this general character, so far as the record shows, was made by Thomas Leavitt in Boston as early as 1877, and Henry E. Waite advanced the money for its construction and was interested in it. This had serious defects which rendered its use impracticable. Howard had been a machinist in Leavitt's shop, and in 1882 undertook to improve on Leavitt's mechanism. Waite advanced the necessary money and was the real owner of the machine constructed by Howard in December, 1882.

To operate this machine, the letters had to be properly faced and packed upon a receiving-board which presented them to the clutching device in turn. Each letter was seized, carried between the rolls, and, at the proper place, received the canceling-imprint. To prevent the deposit of ink upon the pressure-roll, the mechanism was so arranged as to revolve the rolls without contact of the printing-die when no letter was engaged. This was accomplished by the operation of cams that slightly separated the two rolls, when the printing-die on the printing-roll was presented by its revolution to the impression cylinder or roll.

A tripping finger or trigger was arranged, which, when moved, rendered the cams inoperative, thus bringing the rolls in contact. When in normal motion the space between the rolls would admit the letter. The letter would spring the trigger, thereby rendering the cam inoperative, for the time, and bringing the rolls together for the impression of the die upon the letter.

When completed, the machine was taken to the Boston post-office by Waite and Howard, and, under the latter's superintendence, was operated upon letter-mail several hours a day for from four to eight days, prior to February 20, 1883.

After this the machine was photographed from several

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points of view, and these photographs were produced in evidence. It was then taken back to the shop and was never again operated or tested in public; but was partly dismantled and then laid aside.

In May or June of 1883 one Martin V. B. Ettridge communicated to Waite an idea of a canceling-machine with a feeding device operated by a belt for the delivery of the letters to the printing device, in consideration of Waite's promise to furnish \$100 for the construction.

The Howard machine was shown to Ethridge, who then went to work to perfect his feeding device for application to a printing device embodying the features of Howard's machine. Ethridge's machine was made and operated in 1884 or 1885, and various applications for patents, heretofore referred to, were made for his machine and improvements. These were all intended for the benefit of Waite and his associates, and have been secured to a corporation organized by them.

In their argument in support of the claim of the successful reduction to practice of the Howard machine the counsel for the appellant say:

"The only difference between Ethridge and Howard is in the feed. The special advantage of Howard over earlier machines was in not blacking the backs of letters. This advantage was secured for Ethridge from the first and was intended to be, for the Howard machine was put in Ethridge's hands with directions to follow it in this respect, which he did."

Waite and Howard each testified to the successful operation of the machine upon thousands of letters in the Boston post-office, and of their satisfaction with the usefulness of the machine. Both admit, however, that some work was done upon it immediately afterward with a view to make it work more easily and with less noise.

Two subordinate officers of the post-office testified to the operation of the machine at the time claimed, but their testimony as to the extent, manner, and thoroughness of the operation was vague and indefinite, as might well be expected

of witnesses testifying sixteen years after the occurrence.

Counsel for the appellee, in support of their contention that the Howard machine was abandoned as a failure, after the experiment made with it, in favor of the invention of Ethridge and only recurred to after the unsuccessful issue of his interference with Hey, deny the identity of the Ethridge canceling mechanism with that of Howard.

In our view of the case it is not necessary to consume time with these differences. Ethridge was not offered as a witness by the appellant, and whilst Hey offered the record of his testimony in the interference case between them, before referred to, it has not been brought up in the record for submission to this court.

In passing, however, it may be remarked that, if Ethridge did no more than invent a feeding device for adaptation to Howard's successful canceling mechanism, it is strange that he should have claimed the entire machine as his own invention. Moreover, it is still more strange that the beneficiaries of both inventions should have caused applications to be filed in the name of Ethridge alone for all, instead of confining his claim to the improved feeding device and using the name of Howard as claimant of the invention of the novel canceling mechanism.

The several tribunals of the Patent Office, as we have seen, decided against the claim of Howard. In their opinion, under all the circumstances surrounding his acts and those of his assignees, the evidence of the tests made in the Boston post-office was not of sufficient certainty and weight to establish the fact of a successful reduction to practice; and that it showed nothing more than an abandoned experiment.

This concurrence of decision upon a mere matter of fact renders it necessary for the appellant to make out a very clear case of error in order to obtain a reversal. *Hisey v. Peters*, 6 App. D. C. 68, 71; *Hien v. Buhoup*, 11 App. D. C. 293; *Glenn v. Adams*, 12 App. D. C. 175, 178; *Esty v. Newton*, 14 App. D. C. 50, 53.

No such error has been shown, and we are of opinion that

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priority was rightly awarded to the appellee Hey. We think it unnecessary to further discuss the evidence which has been carefully reviewed in all of the decisions referred to and weighed in the light of the rules heretofore declared by this court in a number of analogous cases. *Warner v. Smith*, 13 App. D. C. 111, 115; *Traver v. Brown*, 14 App. D. C. 34, 41; *Esty v. Newton*, 14 App. D. C. 50, 54; *Fefel v. Stocker*, 17 App. D. C. 317; *Reichenbach v. Kelley*, *idem*, 333; *Beals v. Finkenbiner*, 12 App. D. C. 23.

It follows that the decision appealed from must be affirmed. It is so ordered, and that the proceedings and decision of this court be certified to the Commissioner of Patents.

Affirmed.

UNITED SECURITY LIFE INSURANCE AND
TRUST COMPANY OF PENNSYLVANIA

v.

LARNER.

APPEALABLE ORDERS; COSTS.

An appeal raising the question as to which party should pay costs which had accrued in the court below, prior to a former appeal, in a suit by one party to recover from another a certain sum of money to which both made claim by virtue of assignments, *dismissed* upon the ground that the matter was within the discretion of that court, whose order in the premises was not appealable.

No. 1055. Submitted March 21, 1901. Decided April 2, 1901.

HEARING on an appeal by the complainant from a decree of the Supreme Court of the District of Columbia in a suit in equity to determine the rights of the parties to a fund for which both held an assignment. *Appeal dismissed.*

The facts are sufficiently stated in the opinion.

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Mr. Nathaniel Wilson and Mr. Clarence R. Wilson for the appellant.

Mr. Wm. F. Mattingly for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

When this case was here on a former appeal prosecuted by the present appellee (reported in 17 App. D. C. 112), it was then presented on exceptions to the auditor's report and account, by which the balance of the fund in controversy was awarded to the complainant, the United Security Life Insurance and Trust Company, the present appellant. The National Bank of the Republic, and John B. Larner as assignee, severally excepted to the report and account of the auditor as claimants of the whole fund in controversy. Their exceptions, however, were overruled by the court below, and the auditor's report and account were ratified and confirmed, and thereby the fund was held and adjudged to belong to the complainant, the Insurance and Trust Company. From that order the bank and Larner appealed to this court. The order appealed from was reversed *in toto*, and the fund in controversy was held to belong and be payable to Larner, as assignee of the bank, and the cause was remanded that the fund might be disposed of in accordance with the opinion of this court.

The original fund paid over to the attorneys of the parties claiming it, by the Treasurer of the United States, was \$2,920.64. From this amount was deducted the sum of \$250, paid to Cudmore and his attorney, by consent of parties claiming the fund, leaving a balance of \$2,670.64, as the real amount of the fund that was in controversy in that case. Of this amount there was paid out the sum of \$123 for costs and fees to the auditor. But this latter sum was part of the costs of the proceeding which the losing party was liable to be required to pay; and by the order appealed from the losing party was required to pay all costs that had been incurred,

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and to refund the \$123 that had been paid out of the fund that remained subject to the final order of the court.

This court, by its former order of reversal, did not ratify or confirm in any respect the auditor's report and account that had been made; but, on the contrary, by the reversal of the order of ratification, it decided that the fund in controversy belonged to the bank, or to Larner, its assignee. Upon remanding the cause, the fund at once became subject to the order of the court in obedience to the mandate of this court, as if the case had never been subject to the auditor's report and account; and the court, by its order of December 4, 1900, directed the entire fund, including the \$123 that had been paid over to the auditor for costs and fees, to be paid over to Larner as assignee; and in this there was clearly no error. The question on this appeal is nothing other than an attempt to have the costs of the proceeding in the court below, incurred prior to the former appeal, paid out of the fund. But this is not a case where a trust fund has been defended or protected by parties having a fiduciary relation to it; but was simply a proceeding by one party to recover of another a certain sum of money to which both made claim by virtue of assignments. The entire question on this appeal is as to costs which accrued in the court below prior to the former appeal, and was, therefore, within the discretion of that court, and from the exercise of that discretion no appeal lies. The appeal, therefore, must be dismissed. *City Bank v. Hunter*, 152 U. S. 512, 516.

Appeal dismissed.

STICKEL v. STICKEL.

INFANTS, CUSTODY OF; JUDICIAL DISCRETION.

1. Where the custody of children is involved, the courts do not act to enforce the rights of either parent, but to protect the interest and welfare of the children; following *Slack v. Perrine*, 9 App. D. C. 128, and *Wells v. Wells*, 11 id. 392.
2. An order in a *habeas corpus* proceeding instituted by a wife against

her husband awarding the custody of their two-year-old child to the mother, against whom no charges were made showing that she was unworthy or incapable of giving the infant proper care, *affirmed* as not showing that the trial court erred in the exercise of its sound discretion.

No. 1077. Submitted May 9, 1901. Decided May 14, 1901.

HEARING on an appeal by the respondent from an order of the Supreme Court of the District of Columbia in an *habeas corpus* proceeding awarding the custody of a child to the petitioner. *Affirmed.*

The facts are sufficiently stated in the opinion.

Mr. Edward L. Gies for the appellant.

Mr. Campbell Carrington and *Mr. Irving Williamson* for the appellee.

Mr. Justice SHEPARD delivered the opinion of the Court:

The parties to this appeal are husband and wife. They were married in this District on June 17, 1898, and have one child, named Frederick Stickel, who is an infant something more than two years old. Until about March 1, 1901, they lived together in a house occupied by the wife's mother, in the city of Washington. Appellant left the house on account of disagreement with his mother-in-law, and took up his residence with his own mother, who lived a few blocks away. Appellee refused to accompany him, and declined an offer to live with him elsewhere. The child had been ill of scarlet fever before the separation, and, though convalescent on March 20, 1901, was afflicted with a running sore in the ear as a result of that disease. This sore was not dangerous or painful, but required constant cleansing. On that date, the appellant came to the house whilst appellee was absent, carried off the child and put him under the care of his mother, who willingly assumed the burden. There was no complaint

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of ill-treatment of the child, nor was there any pretense that the appellee was not a proper and capable person.

Appellee immediately sued out the writ of *habeas corpus*, and obtained an order restoring the child to her possession pending the hearing.

The hearing was had on March 27th, and the court made an order awarding to the appellee the custody and guardianship of the child, with right to visit it reserved to the appellant, until further order might be made. From this judgment the appeal has been prosecuted.

The appellant's assignment of error embraces the two following propositions: First, the husband and father has the right to fix the domicile of the wife and child; second, that the husband and father is entitled to the custody of the child as against the wife and mother who persists in living apart from him without justification.

In our opinion the case does not turn upon either of these contentions. The first, as an abstract proposition, may be conceded. Whatever may be the law elsewhere in respect of the second proposition, it is settled in this jurisdiction that, whether the custody of children be involved in a direct proceeding like this or as an incident of a suit for divorce, "the courts do not act to enforce the right of either parent, but to protect the interest and general welfare of the children." *Wells v. Wells*, 11 App. D. C. 392, 395; *Slack v. Perrine*, 9 App. D. C. 128, 160.

Bearing this principle in mind, the learned justice who heard the cause, with the parties and the child present, awarded the custody to the mother, against whom, as we have seen, no charges were made tending to show that she was unworthy, or incapable of giving the infant the care best suited to its age and condition of health.

With a like view, the order, though final in its nature so far as the husband's right to appeal therefrom was immediately concerned, reserves the right of renewed inquiry and future control should the interest and welfare of the child hereafter demand a change.

What is best for the child in disposing of its control during

infancy rests in the sound discretion of the trial court, and its exercise thereof will not be reviewed save in a clear case of error. *Wells v. Wells*, 11 App. D. C. 392, 395.

Without reviewing the evidence, it is sufficient to say that we find no such error in the conclusion arrived at; and the order appealed from will be affirmed, with costs. It is so ordered.

Affirmed.

Mr. Chief Justice ALVEY did not participate in the hearing or determination of this case.

WALLACE v. UNITED STATES.

CRIMINAL LAW; HOMICIDE; SELF-DEFENSE; PRAYERS FOR INSTRUCTION.

1. It is not error for the trial court in a homicide case to reject a prayer for the defense that while abusive words and epithets will not justify the taking of life, such words and epithets, if used by the deceased toward the accused at the time or immediately before the killing, are proper to be considered in determining whether the accused acted in self-defense, where the court in other prayers granted for the accused, covered the whole subject-matter by instructing the jury that they should consider the acts and words of the deceased and any threats made by him against the accused at the time of the killing.
2. A prayer for instruction on behalf of the accused in a homicide case in which the defense is that he acted in self-defense, is properly rejected, which states that if upon the whole evidence the jury have a reasonable doubt as to whether the deceased at the time of the killing had in his possession the axe in evidence, the accused is entitled to the benefit of that doubt.
3. Where, in a homicide case, it appears that the accused and deceased were rival lovers of the same woman, and that the accused shortly before the killing and after the deceased and the woman had been car-riding together, sought an explanation of the woman and said to the deceased that he would see him presently, it cannot be successfully contended by the accused that there is no evidence to support a prayer for instruction by the prosecution that if the jury believe that the accused provoked the difficulty with the deceased,

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Argument of Counsel.

and in the progress thereof it became necessary to kill the latter to save himself from death or serious bodily harm, the defendant cannot justify the killing of the deceased on the ground of self-defense.

4. A prayer for instruction granted the prosecution in a homicide case that if the jury believe that the accused invited the deceased to speak with him for the purpose of provoking a difficulty with him in order that he might slay him, the accused cannot avail himself of the defense of self-defense, although he delivered the fatal stroke while in danger of death or serious bodily harm at the hands of the deceased, does not permit the drawing of an inference from an inference, and is not erroneous.

No. 1076. Submitted May 9, 1901. Decided May 16, 1901.

HEARING on an appeal by the defendant in an indictment for murder from a judgment of the Supreme Court of the District of Columbia entered upon a verdict of guilty as indicted.

Affirmed.

The facts are sufficiently stated in the opinion of the court.

Mr. Royal A. Hughes and Mr. L. Malendez King for the appellant:

1. While mere words will not justify the taking of life, they are proper to be considered by the jury as showing the animus of the deceased or party using them, and to determine the sufficiency of the provocation to reduce the killing to manslaughter. If the words were words of menace of bodily harm, accompanied by some outward act showing an intent immediately to do the menaced harm, this would be sufficient provocation to reduce the killing to manslaughter. Greenleaf Evidence, vol. 3, ¶ 124, p. 151; 1 Hale P. C. 456; 1 East P. C. 233; 1 Russell on Crimes, 580 (5th Eng. ed.); Munroe's Case, 5 Ga. 85.

2. It is the right of the parties to have the jury instructed on the law applicable to the case, clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake. And it is the duty of the judge, when requested, to give any requested instruction, which is correct

as a proposition of law and applicable to the issues. Encyclopædia Pl. and Pr., vol. XI, p. 213; *Thornwegan v. King*, 111 U. S. 549; *Livingston v. Maryland Insurance Co.*, 7 Cranch (U. S.) 506. When requested to instruct on the doctrine of reasonable doubt the trial court should comply with the request, and the failure to do so will usually be ground for reversal. Encyclopædia Pl. and Pr., vol. XI, p. 357; *People v. Cohn*, 76 Cal. 386; *Treadway v. State*, 1 Tex. App. 669; *Goode v. State*, 2 Tex. App. 520; *Black v. State*, 1 Tex. App. 369.

3. It is improper to give an instruction where there is no evidence on which to base it, or to submit to the jury matters on which there is no evidence tending to prove. Encyclopædia Pl. and Pr., vol. XI, p. 170; *State v. Henderson*, 49 Ala. 20; *People v. Jones*, 24 Mich. 215; *State v. Osborne*, 45 Iowa, 425; *Crane v. State*, 111 Ala. 45; *Chamberlin v. State*, 25 Tex. App. 398; *Hash v. Com.*, 88 Va. 172; *Ward v. United States*, 14 Wall. (U. S.) 28; *United States v. Breittling*, 20 How. (U. S.) 252.

4. While the law permits the drawing of an inference from an established state of facts, yet it is a proposition of law well settled that the law does not permit the drawing of an inference from an inference. Gillett on Indirect & Collateral Ev., p. 67; *Douglas v. Mitchell*, 35 Pa. St. 440; *Morrissey v. Ingham*, 111 Mass. 63; *United States v. Ross*, 92 U. S. 281; *Throckmorton et al. v. Holt et al.*, Wash. L. R., vol. XXIX, p. 233.

Mr. Ashley M. Gould, United States Attorney for the District of Columbia, for the United States.

Mr. Justice MORRIS delivered the opinion of the Court:

This is an appeal from a judgment of the Supreme Court of the District of Columbia in a criminal cause wherein the appellant was convicted of the crime of murder and sentenced to capital punishment.

The homicide with which the appellant Boyd Wallace, is

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charged took place on the evening of August 7, 1900. The appellant and the deceased were half-brothers, both somewhat powerfully built. For about five years the appellant had been living in criminal intercourse at a house No. 607 N street northwest, in the City of Washington, with a woman of his own race, Harriet Jackson, by whom he had a child; but about a month before the homicide she had ceased to cohabit with him, and had begun to cohabit with Robert Stafford, the deceased, who lived in the same house; and she testified at the trial that she had ceased to love the appellant. On the evening mentioned, having previously rescinded an engagement which she had made to go to a garden party with the appellant, she went with the deceased on a car-ride to Anacostia. On their return from the car-ride Harriet and Stafford were met by the appellant; and the three returned to their house. There soon afterwards, while the three were in the back yard, where also was one Hannah Reed, an aunt of Harriet Jackson, the appellant killed Stafford by stabbing him three times in the abdomen with a large open knife, the wounds from which proved fatal in a few hours. This knife the appellant had been carrying in his pocket for some time; it was about seven inches in length.

Just before the homicide some words had passed between the appellant and the deceased, and between the appellant and Harriet Jackson, which were deemed important by the prosecution as tending to show that the appellant provoked the difficulty which resulted in the homicide, and by the defense as sustaining the theory of self-defense upon which alone the appellant relied. The witnesses for the prosecution are not fully in accord between themselves as to what was then said or as to the circumstances preceding the homicide. The testimony of Harriet Jackson, as stated in the record before us, was to this effect:—

“That during the walk to the house the defendant asked her where she had been; she said,—‘To Anacostia, for a car-ride with Bob;’ defendant said,—‘That looks mighty funny;’ and that nothing more was said until they reached home; that when they reached home she and the defendant

went into the house, and that deceased, Stafford, remained in the front yard. Defendant said to her,—‘ Harriet, I want to speak to you:’ he then said to the deceased,— ‘ Bob, I want to speak to you too:’ she said,— ‘ If you want to speak to me, I am going in the yard, you can speak to me there;’ and that she and the defendant went down the yard into the shed; that deceased accompanied them through the house and continued upstairs to his room; that up to that time the defendant had shown no signs of anger, but spoke in his ordinary tone of voice; that she and the defendant were seated in the shed near the door; that while in the shed the defendant said to her,— ‘ Harriet, it looks mighty funny that every time Bob gets paid you go car-riding with him.’ On hearing his name mentioned the deceased rushed down in the yard, and said,— ‘ What about Bob?’ Defendant said,— ‘ Bob, I am not speaking to you; I will see you presently.’ Deceased said with an oath,— ‘ See me now;’ and at that time they both passed blows; she could not say who passed the first blow: that the defendant was on the inside of the shed, and that the deceased was on the outside at the door; that when defendant and deceased began to pass blows and after they had advanced some distance upon the yard she ran into the kitchen, immediately followed by Hannah Reed; that she did not see a knife in defendant’s hands, and that she was present when the trouble began, and did not see the defendant cut the deceased, nor did she see him have a knife, and that up to the time when she ran into the kitchen, followed by Hannah Reed, no cutting, so far as she saw, had taken place.”

Hannah Reed, the other principal witness for the prosecution, stated in substance:—

“ That on the Sunday night preceding the night of the tragedy the defendant had made threats against the deceased, and said when he got through with Bob the undertaker would gamble on his body; that she had not communicated the threats to the deceased; that on the night of the homicide, the 7th day of August, A. D. 1900, supper was served about five or six o’clock, and that defendant refused to sit at the

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table while the deceased was eating his supper; that after supper the defendant, at the request of Harriet Jackson, went out to sell two tickets, and that a short while after the defendant left the house Harriet Jackson and the deceased went out for a car-ride; that some time after Harriet Jackson and the deceased left the house the defendant returned and asked for Harriet, and that she informed him that Harriet had gone out; that thereupon defendant went to her (Hannah's) room, and said,— 'Hannah, I want to speak to you;' that defendant said to her,— 'Hannah, Bob is doing me wrong; Harriet had an engagement with me and has now gone out with Bob;' and that defendant said,— 'My heart is broken; I cannot stand it any longer,' and that when he got through with Bob the undertaker would gamble on his body.
* * *

Then after narrating the manner of the return home of the parties later in the evening, she added,— "At that time the deceased came down and said,— 'What about Bob?'; and that defendant said,— 'I will show you what about Bob;' that the defendant then pulled out his knife, opened it, and cut the deceased three times, and that the defendant cut the deceased without the deceased having done a single thing to the defendant; that she and Harriet Jackson ran into the kitchen; that Harriet ran first and she ran in behind her; that running into the kitchen she (Hannah) looked back and saw the defendant striking the deceased. * * *

The theory that the appellant acted in self-defense is supported solely by the testimony of the appellant himself who stated that the deceased, having heard his name mentioned, ran at the appellant with an axe, ran him into the woodshed and cut at him, with an expression that he would knock the appellant's brains out, and that he (the appellant) did not take the knife from his pocket until the deceased had run him into the woodshed, and he believed his life was in danger and he could not retreat with safety; that the appellant then went into the kitchen; and that the deceased walked up to the window and said,— "Open the door — I have the axe — I will kill the son of a bitch."

We understand that no exception was taken on either side to the testimony adduced, and none appears on the record. At its conclusion eleven instructions were requested on the part of the defendant to be given to the jury, and eight on the part of the prosecution. Nine of the former were given and two refused: of the latter, five were given, three of them with the acquiescence of counsel for the defendant, and three were rejected. Exception was reserved on the part of the defendant to the refusal of the court to grant the two of his eleven instructions which were rejected, and to the allowance by the court of the two instructions requested by the prosecution which were given without the acquiescence and over the objection of the defendant. And it is upon the action of the trial court in reference to these four instructions that the present appeal and the appellant's assignments of error are based.

It is added in the record before us that "thereupon the trial justice proceeded to charge the jury upon the law bearing upon the case;" and it seems to be conceded that the charge was impartial, fair, and just. At all events, no exception was taken to it, or to any part of it.

The verdict of the jury was, "Guilty as indicted;" and the prisoner was sentenced to be hung. From this judgment he has appealed.

1. The first of the two instructions requested by the appellant, and which were refused, and upon which the first assignment of error is founded, is the eighth in the series of eleven requested. It is in these words:—

"The court instructs the jury that, while abusive words and epithets alone will not justify the taking of life, yet any words or epithets that may have been proved to have been made by the deceased towards the defendant at the time or immediately before the cutting are proper to be considered by the jury in connection with all the other evidence in the case in determining whether the defendant acted in self-defense or not, as self-defense has been defined."

With regard to this instruction it is sufficient for us to say that the whole subject-matter of it was fully covered by

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three other instructions, granted on behalf of the appellant, the second, third and fourth in his series; and that it is unnecessary to multiply instructions on the same point, which differ from each other only in language and not in substance. The most casual inspection of the three instructions referred to will show that they cover the point of this one which was rejected. They are as follows:—

“2. If the jury find from the evidence that Stafford, by his words and acts on the night of the cutting, caused the defendant at the time of the cutting to believe in good faith and upon reasonable ground, and the defendant did believe, that he, Stafford, was about to make a deadly assault upon the defendant, then the jury are instructed that the defendant had a right to use all necessary means to defend himself against such apprehended assault.

3. If the jury find from the evidence that the deceased Stafford, just before the cutting which resulted in his death, approached the defendant in such a way as caused the defendant in good faith to believe, and gave him reasonable ground to believe, that Stafford was about to make a deadly assault upon him, then the defendant was justified in acting upon that belief.

“4. The jury are instructed that, in determining whether the defendant, in taking the life of Stafford, acted in good faith under a reasonable apprehension that he was in danger of losing his own life or suffering great bodily harm at the hands of Stafford, they should take into consideration, along with the other evidence in the case, any threats which the jury shall be satisfied from the evidence Stafford had made against the defendant at the time of the cutting.”

It adds nothing to the words and epithets assumed to have been used by Stafford to call them abusive. If they are to have any force at all, it is as threats against the accused; and if they were threats, they were already given to the consideration of the jury by the appellant's fourth instruction, while in the second instruction the jury had been directed to consider any words or acts of the accused at the time of the cutting, and the fourth instruction was still

broader in its scope. Now, the purpose of instructions is to elucidate the law to the jury; but their multiplication plainly tends to confuse them and to embarrass the administration of justice. We think, therefore, that the instruction in question was properly rejected.

2. The appellant's second assignment of error is founded upon the refusal of the trial court to give to the jury the tenth in his series of instructions, which was in the following words:—

“The jury is instructed that if upon the whole evidence they have a reasonable doubt as to whether Stafford, at the time of the cutting which resulted in his death, had in his possession the axe which is in evidence, the defendant is entitled to the benefit of that doubt.”

We think that this instruction also was properly rejected. Its effect, if granted, would have been to segregate a single piece of evidence, without any good reason for such segregation, and to make the question of reasonable doubt depend upon it, when that question was fully covered by other instructions granted on behalf of the appellant, as it actually was in the present case. Instructions upon separate items of evidence are more apt to confuse than to enlighten a jury. 2 Thompson on Trials, par. 2329. Moreover, the instruction is in itself deficient in precision, and for that reason erroneous in point of law. If the benefit of doubt, which it sought to give to the accused, be the benefit of doubt which should secure his acquittal, as the instruction may naturally be construed, it is manifestly erroneous, because the mere fact that the deceased had an axe in his possession is no proof of anything. Without something additional to show felonious purpose, the mere possession of an axe is an entirely innocent thing, and cannot of itself either excuse or palliate homicide.

3. The third assignment of error arises upon the second of the eight instructions requested by the prosecution, and which was one of the five of those that were given. It is in the following terms:—

“If the jury believe from the evidence that the defendant

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Boyd Wallace provoked the difficulty with Robert Stafford, and in the progress thereof it became necessary to kill the latter to save himself from death or serious bodily harm, yet the defendant cannot justify the killing of Stafford on the ground of self-defense."

This seems to be conceded by counsel for the appellant to be in itself correct law. The contention is that there is no evidence to support it. But we think that there was sufficient evidence to warrant this instruction. In the conduct of the appellant and in the words used by him towards the deceased—"Bob, I will see you presently"—there was sufficient to justify the jury in drawing the inference of a purpose on the part of the defendant to provoke a quarrel with the deceased. These words, and the circumstances under which they were uttered, certainly implied an intention to call the accused to an account for his intimacy with Harriet Jackson; and experience teaches us that the calling of a rival to account in such cases means bloodshed and homicide. And so, if there was testimony tending to show an intention to provoke a quarrel, it was not error to give the instruction in question.

4. The fourth assignment of error relates to the fifth instruction requested by the prosecution and given by the court to the jury, which is as follows:—

"If the jury believe from the evidence that the defendant invited the deceased Robert Stafford to speak with him for the purpose of provoking a difficulty with him in order that he might slay him, then he cannot avail himself of the defense of self-defense, although he delivered the fatal stroke while in danger of death or serious bodily harm at the hands of the deceased."

It is argued on behalf of the appellant that this instruction permits the drawing of an inference from an inference, which is inadmissible in law. But we fail to find that this criticism is justified by the tenor of the instruction. There is but one inference sought to be drawn, that of homicidal purpose in provoking a quarrel and in the course of such quarrel a deadly encounter. The law is that he, who has

provoked a quarrel, which is calculated to lead to homicide, and which in fact does lead to homicide, cannot thereafter claim as an excuse for the homicide that he acted in self-defense. The inference here sought to be drawn is whether certain words, or certain words and conduct, implied an intention to provoke a quarrel, and not whether the quarrel so provoked was intended for the purpose of committing the homicide. If the quarrel in its nature and character was homicidal, as the quarrel between the appellant and the deceased undoubtedly was, the law itself draws the inference of a purpose to slay. But the inference which may not be built upon an inference is the inference of one fact from some other fact, which is itself merely an inference. The intent of the appellant in the invitation which he extended to the deceased to confer with him, is the fact here to be inferred. The jury were told by the instruction in question that from such invitation they might infer homicidal purpose on the part of the appellant; but they were not told that from such homicidal purpose they might infer something else necessary to be made apparent.

We find no error in any of the instructions granted by the trial court, and no error in the rejection of those which are refused. It appears to us from the record that the appellant had a just, fair, and impartial trial, and that the rulings of the court were as favorable to him as he could reasonably have expected.

We must affirm the judgment appealed from. And it is so ordered.

MILLER v. KELLEY.

PATENTS; INTERFERENCE; ORIGINALITY OF INVENTION; DISCLOSURE;
MASTER AND SERVANT; PRESUMPTIONS; BURDEN OF PROOF.

1. In an interference case involving a match-making machine, where the question was not one of priority of invention, but one of originality, each party claiming to have conceived the invention which was embodied by them in a machine constructed in the shop of one of the parties, who was the employer of the other, and where the direct testimony upon the question of which party disclosed the invention was confined to the depositions of the parties themselves, it was *held* that the weight of the testimony was with the employer, the collateral circumstances showing that the latter was an expert machinist and well acquainted with match-making machines, while his employee had never invented anything and, until he entered his then employment, had never seen such a machine, and would not have known one if he saw it, and also that the latter refused on his examination to answer proper questions.
2. While, if an employee makes an invention wholly independent of his employer, the invention belongs to him, and does not inure to the benefit of the employer, when in the course of experiment by an employer with an invention, a device is suggested for its improvement which in itself would reach the dignity of independent invention, and a dispute arises between employer and employee as to its conception, the presumption is in favor of the employer, and it is incumbent on the employee to overcome that presumption by satisfactory proof.

No. 154. Patent Appeals. Submitted November 16, 1900. Decided May 21, 1901.

HEARING on an appeal from a decision of the Commissioner of Patents in an interference case. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. Prindle & Russell for the appellant.

Mr. E. B. Stocking for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:
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This appeal is taken from a decision of the Commissioner of Patents in an interference case, wherein the matter in issue between the parties is defined in nineteen several counts, embracing three classes of improvements in match-making machines, as follows:

" 1. In a match-machine, the combination of a splint-carrier and a splint-evening roll provided with a roughened splint-engaging surface, substantially as specified.

" 2. In a match-making machine, the combination of a splint-carrier adapted to receive and carry splints transversely to the carrier, and parallel evening-rolls located upon opposite sides of said carrier to respectively engage the opposite ends of irregularly-held splints, the axis of said rolls being parallel to the face of the carrier and to the rows of splints.

" 3. In a match-machine, the combination of a splint-carrier, means for feeding splints thereto, dipping mechanism and rolls on opposite sides of said carrier adapted to respectively engage the opposite ends of irregularly-placed splints, substantially as and for the purpose specified.

" 4. In a match-making machine, the combination of a splint-carrier and evening-rolls located upon opposite sides thereof, one of which is provided with longitudinal grooves or depressions, substantially as specified.

" 5. In a match-making machine, the combination of a splint-carrier, evening-rolls upon opposite sides of the carrier, one of which is provided with a roughened periphery and the opposite roll with a grooved periphery, substantially as specified.

" 6. In a match-making machine, the combination of a splint-carrier, and evening mechanism embodying a longitudinally-grooved roll located to engage the ends of irregularly-placed splints, substantially as specified.

" 7. In a match-machine, the combination of a series of splint-engaging bars, a chain or carrier therefor, a device to engage with and move said bars from the latter, and means

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to hold said bars in engagement with said device, adapted to permit their release at a certain point in their travel therewith, substantially as and for the purpose specified.

"8. In a match-machine, the combination of a series of splint-engaging bars, a chain or carrier therefor, means for disengaging said bars from the latter that cause them to move in a curved path, and means to hold said bars in engagement with said disengaging means, adapted to permit their release at a certain point in their travel, substantially as and for the purpose specified.

"9. In a match-machine, the combination of a series of splint-engaging bars, carrier-chains therefor, wheels to engage the bars whose peripheries move in paths from which the chains diverge, spring-plates extending concentric with said wheels, having one end free, and means moving the bars from the wheels, substantially as and for the purpose shown.

"10. In a match-machine, the combination of a series of bars, angular in cross-section, the opposing sides of adjacent bars being adapted to engage the splints, a chain for engaging and moving said bars, a bar-engaging device moving in a path diverging from that traveled by the chain, to take the bars from the latter, and means, engaging the sides of the bars, carried by said bar-engaging and moving device, substantially as and for the purpose described.

"11. In a match-making machine, the combination of a series of bars angular in cross-section, a chain for moving said bars, a rotary bar-engaging device moving in a path diverging from the path traversed by said chain, and means carried by said rotary device to engage the sides of the bars when in contact with said device, substantially as specified.

"12. In a match-making machine, the combination of a series of bars angular in cross-section, the opposing sides of adjacent bars being adapted to receive and engage match-splints, a chain for moving said bars, a rotary device for moving said bars in a path diverging from the path of the chain and provided with portions to engage the sides of the bars and retain them in a fixed relation to said device, and

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means for disengaging the bars from said rotary device, substantially as specified.

" 13. In a match-machine, the combination of a series of bars, angular in cross-section, the opposing sides of adjacent bars being adapted to engage the splints, a chain for engaging and moving said bars, a bar-engaging device moving in a path diverging from that traveled by the chain, to take the bars from the latter and means carried by said device that engage and hold the bars from movement relative thereto, substantially as and for the purpose specified.

" 14. In a match-machine, the combination of a series of bars, angular in cross-section, the opposing sides of adjacent bars being adapted to engage the splints, a chain for engaging and moving said bars, a bar-engaging device moving in a path diverging from that traveled by the chain, to take the bars from the latter, and means whereby the position of the bars relative to said device may be maintained during the time of their engagement therewith, substantially as and for the purpose set forth.

" 15. In a match-machine, the combination with a series of splint-engaging bars that are angular in cross-section, with pintles at their ends, a chain or carrier for said bars, and toothed wheels to engage said pintles and disengage the bars from the carrier, said wheels having surfaces to engage the bars to prevent the rotation thereof relative to the wheels as the latter revolve, substantially as and for the purpose described.

" 16. In a match-machine, the combination of a series of splint-engaging bars, between adjacent ones of which splints are held, a chain or carrier therefor, a rotary carrier for disengaging said bars from the latter, and means rotating with said rotary device that engage said bars and prevent the rotation of the same on their axis relative to the carrier when carried by the latter, substantially as specified.

" 17. In a match-machine, the combination of a series of splint-engaging bars, between adjacent ones of which splints are to be held, a chain-carrier therefor, means for disengag-

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ing said bars from the latter, and positively-acting means that engage the bars while being disengaged and control their rotation on their axis, substantially as and for the purpose set forth.

" 18. In a match-machine, the combination of a series of bars, angular in cross-section, the opposing sides of adjacent bars being adapted to engage the splints, a chain for engaging and moving said bars, a rotary bar engaging for moving said bars in a path diverging from the path of the chain, to disengage the bars and chain, portions of which device engage the sides of the bars and hold them in a fixed position relative to the device, means for moving the bars from said device into engagement with the chain again, and means for placing splints in the path of the bars as they are moved after such reengagement, substantially as and for the purpose set forth.

" 19. In a match-machine, the combination of a series of splint-engaging bars that are angular in cross-section, between adjacent ones of which splints are held, a chain or carriage therefor, a rotary carrier device for disengaging said bars from the latter, and means that engage the flat sides of the bars for preventing rotation of said bars on their axes relative to said rotary carrier when carried by the latter, substantially as and for the purpose shown."

Of these counts those numbered 1, 2, 3, 4, 5, and 6 embody the evening rolls placed upon the machine; those numbered 7, 8, 14, and 19 relate to the means employed for carrying the bars through the main head of the machine, that is, the guides, the sprocket-wheel, and the auxiliary chain; and those numbered 9, 10, 11, 12, 13, 15, 16, 17, and 18, refer to the rectangular carrier-bars, the sprocket-wheels with flat-faced hubs for controlling the rotation of the bars, an auxiliary chain for gripping the bar after the next bar has been knocked up to grip the match-splints; means for holding the carrier-bar in the tooth of the sprocket-wheel while space for the match-splints coming from the reciprocating head is being made between the face of the two bars; and spring-fingers to hold back the bars tempo-

rarily in the sprocket-wheel until forced ahead by the knocker.

The appellant, Frederick J. Miller, claims to have made the invention set forth in counts 1 to 6, both inclusive, in the month of January, 1897, when one full-sized machine embodying it, was constructed; and to have made the invention set forth in counts 7 to 19, both inclusive, in the month of December, 1896, and to have then embodied it in a full-sized operative machine. He filed his application in the Patent Office on April 12, 1897.

The appellee, Alexander Kelley, claims to have conceived and disclosed the invention set forth in counts 1 to 6, both inclusive, in 1893; to have made sketches and drawings of it in November of 1896; and to have embodied it in a full-sized operative machine, commenced on August 3, 1896, and completed and successfully tested about February 23, 1897. He claims to have conceived, disclosed, and sketched the invention shown in counts 7, 8, 14, and 19, in the years from 1890 to 1893, both inclusive; to have made a full-sized model of it in October of 1895, and an operative machine in November of 1896. And he claims to have made the invention set forth in counts numbered 9, 10, 11, 12, 13, 15, 16, 17, and 18, about November 18, 1896, when, or within a few days afterward, he embodied it in a full-sized operative machine. The invention embraced in all the counts was embodied in a full-sized match-making machine begun in the appellee's shop in Wilmington, Del., about August 3, 1896, and completed and successfully operated at the same place about February 23, 1897. Kelley came to the Patent Office with his application on June 3, 1898, which was more than a year after Miller's application. It may be added here that there was actual reduction to practice by either one of the contestants about February 23, 1897; and that it is the same act which is relied upon by both parties. Miller was a workman or machinist in the employment of Kelley at the time, and worked upon the machine in question. The controversy, therefore, is not really one as to priority of invention, but as to originality.

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In other words, the question is which one of these two suggested the conception which was embodied by them in the machine constructed by Kelley at his shop in Wilmington, Del., between August 3, 1896, and February 23, 1897.

All the tribunals of the Patent Office, the board of examiners-in-chief however with a division, have awarded judgment in favor of Kelley. And from the decision of the Commissioner in that regard, the cause has now been brought here by appeal.

We are of opinion that there is no error in the conclusion reached by the Commissioner of Patents and the tribunals of his Office in this case; and being of that opinion, after full consideration of the record, we deem it wholly unnecessary to review the testimony at any length. It would serve no useful purpose to add another analysis to the three very careful and elaborate examinations of the record made by the tribunals of the Office, when the analysis would merely lead us to the same conclusion. It will suffice for us to say that, in reference to the crucial question in the case, whether the disclosure of the invention, which in this case must determine its parentage, emanated from the appellant to the appellee, or from the appellee to the appellant, the direct testimony is confined to the depositions of the parties themselves; and that the weight of this testimony and its inherent probabilities are in favor of Kelley. In the collateral circumstances there is some corroboration of Kelley, but none of Miller. And every statement of the latter, with reference to matters alleged by him to have taken place in the presence of other persons, is flatly contradicted by those persons. Moreover, the appellant's manner in giving his testimony, as evidenced by the record, and his curt refusals to answer questions put to him, some of which at least he might have readily and properly answered, if he was in good faith, are not calculated to convey a favorable impression of his testimony, or to entitle that testimony to any great weight — although there is perhaps a partial excuse for his course in the fact that he is a foreigner not well acquainted with the English language and not familiar with technical terms.

But there are other considerations which must have weight in the determination of the controversy. Kelley was an expert machinist. He was well acquainted with match-making machines. He was at the time of this invention engaged in experimenting with a match-making machine that would obviate some of the difficulties and deficiencies of previously-existing machines; and he had taken out at least one patent for such a machine. He was desirous to keep his device a secret until it should be perfected; and he suspected that a rival organization was striving to gain possession of his secret. On the other hand, Miller was merely a workman or mechanic, employed by Kelley to assist him with his construction, who was in Kelley's employment only from October 12, 1896, to March 2, 1897, who had never before invented anything, who was a rover and a wanderer remaining not long in any employment, and who at the time of his entrance into Kelley's employment admitted that he had no knowledge of match-making machines, and would not know one if he saw it. While it was not impossible that he should make this invention, he certainly was not qualified for it by any previous training, and the probabilities of his making it are all against him.

But even if the testimony on behalf of Miller were greatly stronger than it is, and if it could be said to balance that of Kelley, which we do not think it does, yet there still remains the strong presumption against him arising from the relation of employer and employee subsisting between Kelley and himself. It was well said by Mr. Commissioner Marble in the case of *Harrison v. Hogan* (18 O. G. 921), that "it is a familiar doctrine that as between an employer and a party employed for a special purpose, matters merely auxiliary or tributary to the main invention can give to the employee no claim as an inventor, and in regard to such features as amount to independent inventions a presumption exists in favor of the employer as the author of the same which can only be overcome by conclusive and unequivocal proof."

This doctrine the Commissioner has cited as applicable in the present case; and he adds:

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"No sufficient proof has been presented in the present case to overcome the natural presumption from the relations of the parties; but, on the contrary, the evidence as a whole tends to support that presumption."

We think that this conclusion is fully warranted by the record, and that the doctrine announced is a fair and just exposition of the law, and is decisive of this case.

We do not mean, of course, to be understood as holding or sanctioning the idea that the employee's intelligence is all for the time being given over to the employer, and that the employee retains no independent power of invention. On the contrary, the employee is to be protected from the rapacity of the employer, as much as the employer from the dishonesty of the employee: and if the employee makes an invention wholly independent of the employer, it is the law that the invention belongs to him who actually makes it, and that it does not inure to the benefit of the employer. What we hold is that when in the course of experiment by an employer with an invention a device is suggested for its improvement which in itself would reach the dignity of independent invention, and a dispute arises between employer and employee as to its conception, the presumption is justly in favor of the employer, and it is incumbent on the employee to overcome that presumption by satisfactory proof.

We conclude that the decision of the Commissioner of Patents in favor of the appellee should be affirmed; and it is hereby affirmed.

The clerk of the court will certify this opinion and the proceedings in the cause in this court to the Commissioner of Patents according to law.

ADAMS v. MURPHY.

PATENTS; INTERFERENCE; ABANDONED EXPERIMENT; PRESUMPTIONS.

Where an applicant in interference with another claims to have reduced his invention to practice in July, 1897, but it appears that thereafter, although he worked upon and procured patents for other closely-related inventions, he did nothing with the one in controversy until he filed his application in January, 1899, and in the meantime his rival entered the field, conceived and perfected the invention and filed his application for the device for which there seems to have been a demand by the public, the presumption is that that which is claimed to have been reduction to practice was no more than a mere abandoned experiment.

No. 122. Patent Appeals. Submitted November 21, 1900. Decided May 21, 1901.

HEARING on an appeal from a decision of the Commissioner of Patents, in an interference case. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. Church & Church for the appellant.

Messrs. Wetmore & Jenner for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

This is an appeal from the decision of the Commissioner of Patents in an interference case.

The invention in controversy has reference to fastening devices for gloves and other articles, wherein there are used a resilient or spring-stud member and a rigid socket member, adapted to become firmly attached to each other, yet so as to permit a ready disengagement. And the special purpose of the invention seems to have been to reduce the number of the

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component parts of the spring-stud, while at the same time securing firmness, elasticity, and facility of attachment to the fabric. The issues or statements of the invention are six in number, not substantially differing from each other so far as the question of invention is concerned, and are as follows:

" 1. A spring-stud intended for engagement with a rigid socket, consisting of a head made resilient by vertical slits, a flanged base integral with the lower end of the head, a centrally-located interior tube integral with the upper end of the head and depending therefrom, said tube operating as a support for the resilient head.

" 2. A stud intended for engagement with a rigid socket, said stud consisting of a head made resilient by vertical slits, a flanged base at the lower end of the head, a centrally-located interior tube integral with the upper end of the head, depending therefrom and projecting below the under side of the fabric to which the stud may be attached, said tube operating as a support for the resilient head.

" 3. A spring-stud consisting of a head, made resilient by vertical slits, a centrally-located interior tube integral with the upper end of the head, and depending therefrom, in combination with a flanged eyelet adapted to enter the centrally-located interior tube and to be expanded within the same to attach the stud to the fabric.

" 4. A stud member for separable fasteners having a base-flange, outwardly-bowed resilient sections extending therefrom upwardly to form a head, and an internal attaching-stem formed integral with and depending from the top of said head; substantially as described.

" 5. A stud member for separable fasteners having a base-flange, outwardly-bowed resilient sections extending upwardly therefrom to form a head, and a tubular internal attaching-stem formed integral with and depending from the top of said head, the lower end of said stem being contracted, substantially as described.

" 6. A spring-stud consisting of a head, made resilient by vertical slits, a centrally-located interior tube integral with

the upper end of the head and depending therefrom, and means for securing the centrally-located interior tube to the fabric, substantially as described."

William B. Murphy was the first to come into the Patent Office: he filed his application on August 17, 1898. In his preliminary statement filed for the interference he alleged that, after some partial conceptions of the invention in the years 1895 and 1896, he conceived the complete invention about November 15, 1897, and reduced it to practice about December 1, 1897, by the construction of a full-sized working stud, afterward by the construction of two others, all of which he exhibited to other persons, and thereafter by making one or more each month. He had not, however, attempted to manufacture the article on a commercial scale; although in April of 1898, he began to make tools for the construction of the studs for commercial use.

George E. Adams filed his application in the Patent Office on January 14, 1899, nearly five months after Murphy. In his preliminary statement, he alleged that he conceived the invention, made it public, and reduced it to practice by the construction of a sample which was a full-sized operative device all in the month of July, 1897; but that he had not manufactured any of the articles for the market.

Upon the testimony adduced in the cause, all three of the tribunals of the Patent Office awarded judgment of priority of invention to the appellee Murphy. A curious condition, however, was developed in the board of examiners-in-chief. Only two of the three members of the board sat in the case and heard the arguments. They were divided in opinion. Then the third member of the board read the record, and decided in favor of Adams; whereupon Murphy appealed to the Commissioner. The latter regarded the intervention of the third member of the board as irregular, and the action of the board as equivalent to an affirmance of the decision of the examiner of interferences. Upon consideration of the merits, he awarded judgment of priority to Murphy. And from his decision Adams has prosecuted the present appeal.

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No question seems to be made as to the fact that Murphy conceived, disclosed, and reduced to practice the invention in controversy, except as stated in the second count, about the beginning of December, 1897; and that, as to count second, he reduced it only to constructive practice by the filing of his application. But whether his reduction to practice was actual or only constructive of any or all the issues, is of no consequence under the circumstances of the present case. He is entitled in any case to constructive reduction to practice as of the date of the filing of his application, August 17, 1898. It is unnecessary to review the testimony on his behalf, as it is not attacked, and its sufficiency seems to be conceded to establish his claim as set forth in his preliminary statement. The controversy has been made to depend upon the sufficiency of the testimony on behalf of Adams to show conception of the invention by him and its actual reduction to practice in July of 1897, which, of course, would antedate the conception of Murphy. It is not claimed or shown that Adams did anything whatever in reference to this invention between the end of July of 1897 and the time of his application to the Patent Office on January 14, 1899. Consequently, unless he reduced the invention to actual practice in the month of July of 1897, he must necessarily fail. For in the interval between July of 1897 and January of 1899, during which, so far as this invention is concerned, Adams was wholly inactive, without any excuse for the inactivity, Murphy entered the field, conceived the invention, reduced it to practice, and filed his application in the Patent Office. The question then is reduced to the inquiry whether Adams had the invention and reduced it to practice in July of 1897.

The testimony in support of his claim consists mainly of his own and that of Henry C. Hine, who is secretary of the company of which the appellant is vice-president. Of his own testimony, which fairly enough supports his preliminary statement, the salient points are, that on or before July 9, 1897, he made drawings of his invention; that on that day he called Hine to witness them; that these drawings or sketches, which were produced in evidence in the cause,

showed two different inventions very nearly related to each other, both appearing on the same piece of paper, of which one was the invention now in controversy and the other was one for which the appellant subsequently obtained a patent; that the paper bore words and figures to the following effect: "Sketches made July 9, 1897, Geo. E. Adams;" "Witnessed July 9, '97, H. C. Hine," of which all, except the name of H. C. Hine, were in the handwriting of Adams; that the name of Hine was appended by himself when he was called to witness the sketches; that subsequently in the same month Adams manufactured dies with which he made the studs involved in the controversy; that he made several specimens of studs, and carefully preserved both the dies and studs, all of which were offered in evidence.

Hine's testimony was substantially to the effect that he remembered his witnessing the sketches at the request of Adams on July 9, 1897, a date which he claimed to remember distinctly and positively upward of two years afterward when he testified, although his memory was weak about everything else, and he gives no reason whatever for remembering this date above any other: and he identified the dies used by Adams and the specimens of studs manufactured by the latter with these dies.

And yet it subsequently appeared conclusively in the evidence, and it was admitted by Adams, that the dies so confidently identified and produced could not make the studs which had been shown as their product. Thereupon another die was produced and offered in evidence which could do the work.

All this was very unfortunate for the case of Adams. As was well pointed out by the Commissioner of Patents in his opinion contained in the record before us, not only his position as the junior applicant, but likewise the rule laid down by this court in the case of *Warner v. Smith*, 13 App. D. C. 111; 84 O. G. 311, required him to account satisfactorily for his delay, wholly unexplained, and his total inaction in respect of this invention for which no excuse is given, although during this same period he was active enough in procuring

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patents for other closely-related inventions. We said in that case that delay and inaction of this kind totally unexplained, during which a rival entered the field of invention, conceived and perfected the invention, and made his application to the Patent Office for a device for which there seems to have been a demand by the public, would justify the Patent Office and the courts in presuming that what was claimed to be reduction to practice amounted to no more than a mere abandoned experiment until the contrary is clearly shown.

We are not persuaded that the proof in this case on behalf of Adams, on whom is the burden of proof, is clear and satisfactory. It is not such as carries conviction with it. It is discredited by its own inherent weakness. The mistake in regard to the dies, while perhaps in itself excusable and capable of satisfactory explanation, is sufficient to show that implicit reliance is not to be placed on other portions of the testimony.

We are of opinion that the decision of the Commissioner of Patents was right and just, and that it should be *affirmed*. *Judgment of priority of invention is awarded to the appellee, William B. Murphy.*

The clerk of the court will certify this opinion and the proceedings of the court in the cause to the Commissioner of Patents.

McGEE v. WELCH.

EQUITY; LACHES; FRAUD.

1. The defense of laches will not be sustained upon a demurrer when the bill clearly charges fraud, and it appears that the complainants have instituted their proceeding within a reasonable time after their discovery of the fraud.
2. An amended bill of complaint filed June 23, 1900, to vacate a deed of certain real estate dated July 15, 1843, charged the fraudulent procurement of the deed by the person under whom the defendants claimed, from an imbecile, who was under his control; a fraudulent

combination between a niece of such person, one of the defendants, and another person to divide the property of the imbecile, after the latter's death, May 23, 1891, in fraud of her heirs-at-law, the complainants; and fraudulent abstraction and concealment by the defendants of papers from the files of the court in an equity cause involving the same real estate. Complainants stated that they only suspected the fraud within three years of the commencement of their suit, and had no actual proof of it until within one year. *Held*, reversing a decree dismissing the amended bill on demurrer upon the ground of *laches*, that it should not have been disposed of on demurrer, but that leave should be reserved to the defendants to make the defense of *laches* in their answer and at the hearing.

No. 1022. Submitted February 13, 1901. Decided May 21, 1901.

HEARING on an appeal by the complainants from a decree of the Supreme Court of the District of Columbia, sustaining a demurrer to and dismissing a bill in equity to vacate a deed of certain real estate, upon the ground of *laches*.

Reversed.

The COURT in its opinion stated the case as follows:

This is an appeal from a decree of the Supreme Court of the District of Columbia, whereby, upon a bill in equity filed to vacate a deed purporting to convey title to certain real estate in the City of Washington and upon a demurrer filed thereto, the court dismissed the bill of complaint on the ground of *laches*.

The facts, as they appear from the bill, which, of course, must for the present at least be assumed to be true, are these. The property in controversy belonged to one Nicholas Whelan, who died about the year 1830. From him it descended to his daughter, Catharine Ann Whelan, who died in Montgomery County, in the State of Maryland, in the year 1891. She was from birth feeble-minded and deficient in normal mental capacity; and she remained through life a simpleton, incapable of executing a valid deed or contract. She finally became notoriously insane, was so adjudged by a jury of inquisition, and in such condition died. She lived and died upon a farm in Montgomery County, Maryland,

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which also, like the property here in controversy, she had inherited from her father.

Soon after the death of Nicholas Whelan and several years prior to the year 1840, by some means alleged by the complainants to be unknown to them, one Thomas Connelly, also at the time a resident of the said Montgomery County, took up his residence on the farm of Catharine Ann Whelan, assumed the management and control thereof and of all her affairs, and kept her in confinement in her house until his death, which occurred about August 4, 1862. What his relationship, if any, was to the poor imbecile, or who her next of kin were at the time, we are not informed by the bill of complaint.

On or about July 15, 1843, while Connelly thus had the imbecile within his power and control, he fraudulently procured from her a deed of conveyance of the property in the City of Washington already mentioned, which deed was duly recorded among the land records of the District of Columbia, and he entered into the possession and control of the property. When he died in 1862 the record title and ownership became vested by descent in his niece and sole heir-at-law, the appellee, Mary J. Welch, who yet remains such record owner and possessor, subject only to a deed of trust or mortgage thereon for the payment of the sum of \$2,300 and interest, payable three years after date, executed by her and her husband, her co-appellee Edward P. Welch, on or about April 28, 1897, which mortgage debt had not become due when the original bill of complaint in this case was filed on January 9, 1900.

Connelly was unmarried at the time at which he took the possession of Catharine Ann Whelan's property and affairs, and at the time at which he procured from her the deed which has been mentioned. He married in 1845; and his wife, who survived him, continued the same possession, control and dominion after his death, and until the year 1866. In this last mentioned year one Susan A. Beall, of said Montgomery County, now deceased, and others not named in the bill of complaint, whether related to Catharine Ann

Whelan or not does not appear, filed their petition in court in that county for an inquisition of lunacy in the case of said Catharine Ann Whelan, whereupon said Catharine Ann Whelan was adjudged a lunatic and Susan A. Beall was appointed committee of her person and trustee of her estate.

On November 27, 1867, said Susan A. Beall, as such trustee, and Benjamin Beall, her husband, now also deceased, filed their bill in equity in the Supreme Court of this District against Mary J. Welch and Edward P. Welch, already mentioned, and one Henry Nailor, who held certain mortgages on the property in controversy created by Thomas Connelly, but subsequently, it would seem, satisfied, to vacate the deed of July 15, 1843, fraudulently procured by Thomas Connelly from Catharine Ann Whelan. This suit lingered in court for upwards of twenty-seven years. Testimony was taken in it. But, with the exception of some few unimportant papers, both the pleadings and testimony have disappeared from the files of the court and are not to be found, and they are charged to be in the possession or under the control of the said Mary J. Welch and Edward P. Welch, or at all events to be somewhere within their knowledge. The cause never reached a final hearing, and it was dismissed on July 26, 1894, as having been abated by the death of Catharine Ann Whelan, which had occurred on May 23, 1891.

Soon after the death of Catharine Ann Whelan and before the dismissal of the suit in equity just mentioned, the heirs of Thomas Connelly propounded for probate in Montgomery County, Maryland, a paper writing purporting to be the last will and testament of Catharine Ann Whelan, and bearing date on September 28, 1844, which was about fourteen months subsequent to the date of the deed now sought to be vacated, and about ten months prior to the marriage of Connelly. By this alleged last will and testament Catharine Ann Whelan purported to devise and bequeath all her estate, both real and personal, to Connelly. Susan A. Beall, already mentioned, falsely representing herself, as the bill of complaint alleges, to be one of the heirs-at-law of Catharine Ann

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Whelan, filed a caveat to the probate of the will, naming Mary J. Welch, Edward P. Welch and Sarah A. Connelly, the widow of Thomas Connelly, as caveatees. Issues were framed, which were sent at the instance of the caveatees to the court of Washington County, Maryland, to be tried. After much testimony had been taken, a compromise was reached between the parties on June 20, 1894, in pursuance of which the caveat was withdrawn, the alleged will was admitted to probate on July 3, 1894, and the property claimed under such will was equally divided between Susan A. Beall and Mary J. Welch. In pursuance also of the same agreement Susan A. Beall, in consideration of the sum of \$2,500, was to execute to Mary J. Welch a quitclaim deed of the property in controversy in the equity suit which has been mentioned. The complainants allege that they had no knowledge of this compromise at the time at which it was made, or until within a period of three years before the institution of this suit, and that Susan A. Beall was induced to make the compromise in consideration of a large pecuniary benefit to herself, and in fraud of the rights of the complainants, who were ignorant of all her proceedings.

The complainants, twenty-six in number, of whom eighteen reside in the District of Columbia, one in Virginia, one in Illinois, and six in Montgomery County, Maryland, allege themselves to be the next of kin and sole heirs-at-law of Catharine Ann Whelan, but that they had little acquaintance or association with her, supposed that Connelly had been duly appointed her guardian by some court of competent jurisdiction, had no reason to suspect him and had no suspicion of his fraud until within three years before the institution of the suit, and had not in their possession any evidence of the fraud until within twelve months before the suit was commenced.

These are the allegations of an amended bill of complaint which was filed on June 23, 1900, and the prayer of which is for the vacation of the deed of July 15, 1843, and for an account of rents and profits. The original bill had been filed on January 9, 1900; and it differs from the amended bill in

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this that it makes no mention of the proceedings in regard to the probate of the will of Catharine Ann Whelan and the compromise effected by the parties to those proceedings.

A general demurrer on the ground that there was no equity in the bill was interposed on behalf of Mary J. Welch and Edward P. Welch, and the holders of the deed of trust or mortgage on the property demurred on the ground of *laches*. The court sustained the demurrer on the ground of *laches* and dismissed the bill. And from the decree of dismissal the present appeal has been prosecuted.

Mr. Frank T. Browning, Mr. Charles A. Keigwin and Mr. Charles Earl for the appellants.

Mr. W. D. Davidge, Mr. J. A. Maedel and Mr. W. D. Davidge, jr. for the appellees:

1. The defense of *laches* may be made by demurrer. *Quirk v. Leibert*, 12 App. D. C. 394; *Lansdale v. Smith*, 106 U. S. 391; *Speidel v. Henrici*, 120 U. S. 385; *Bank v. Carpenter*, 101 U. S. 567.

2. Appellants admit knowledge for a number of years "in a general way" as to the insanity, the custody of the lunatic's person, and the control of her estate. They do not even aver that they have made diligent efforts to ascertain the state of facts. A mere allegation of diligence would not be sufficient, but would be clearly better than nothing. This is merely a restatement of the complainants' *laches*; it is not an explanation of any delay whatever. They merely say that until recently they did not know what their rights were; but this is not sufficient. A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. *Hardt v. Heidmeyer*, 152 U. S. 547, 559, citing and approving *Godden v. Kimmell*, 99 U. S. 201, 211, and *Wood v. Carpenter*, 101 U. S. 135, 140. See also *Foster v. Mansfield, etc., RR. Co.*, 146 U. S. 88. And

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especially must there be distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made. *Stearns v. Page*, 7 How. 819, 829. See also *Badger v. Badger*, 2 Wall. 87, 94, 95; *Foster v. Mansfield, Coldwater, &c., Railroad*, 146 U. S. 88; *Halstead v. Grinnan*, 152 U. S. 412; *Wood v. Carpenter*, 101 U. S. 135, 140; *Richards v. Mackall*, 124 U. S. 183; *Felix v. Patrick*, 145 U. S. 317; *Evers v. Watson*, 156 U. S. 534; *Ware v. Galveston City Co.*, 146 U. S. 102; *Wollensak v. Reiher*, 115 U. S. 96.

3. The rule does not require *actual knowledge* to sustain the defense of *laches*. *Means of knowledge* is equivalent to actual knowledge. *Teall v. Slaven*, 14 Sawyer, 364; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417; *Johnston v. Mining Co.*, 148 U. S. 360; *Percy v. Cockrill*, 10 U. S. Ap. 574; *Wood v. Carpenter*, 101 U. S. 140; *Wollensak v. Reiher*, 115 U. S. 99; *Swift v. Smith*, 79 Fed. Rep. 712-714.

4. The complainants' *laches* in the former suit is sufficient *per se* to bar recovery. *Johnston v. Standard Mining Co.*, 148 U. S. 360; *Willard v. Wood*, 164 U. S. 502.

5. The bill does not allege a cause of action in the complainants. The wrong alleged, if any, was not a wrong done to them, but to Kitty Ann Whelan, whose suit by the committee abated and has not been revived. *Boardman's Case*, 2 Bland, 85, 98; *Shelford on Lunacy*, 208; *Cain v. Warford*, 3 Md. 454, 461; *Alexander's Ch. Pr.* 238. On abatement it became necessary to revive in behalf of those claiming authority to continue the suit. Rule No. 50, Supreme Court of the District of Columbia. Rule No. 56, Supreme Court of the United States.

Mr. Justice MORRIS delivered the opinion of the Court:

While it is startling to find a bill in equity filed to procure the annulment of a deed of conveyance now nearly fifty-

eight years old, and the defense of *laches* and long delay is one that naturally suggests itself to the consideration of every reasonable person, yet we are of opinion that, in view of the allegations of this bill of complaint and of the extraordinary circumstances therein stated, this case is not one to be disposed of on demurrer.

Three serious charges of fraud are made in the bill, two of them of an exceedingly grave nature. The first is the procurement of the deed of July 15, 1843, by Thomas Connelly from the imbecile under his control: the second is the alleged fraudulent combination and compromise effected between Mary J. Welch and Susan A. Beall after the death of Catharine Ann Whelan to divide the property of this latter between themselves in fraud of her next of kin and heirs-at-law; and the third is that of fraudulent abstraction and concealment of papers from the files of the court. Now, while it is true that the defense of *laches* may be availed of on demurrer, where it is plain on the face of the bill of complaint that there has been undue delay on the part of the complainants to assert their rights, and no sufficient reason is set forth to excuse such delay, yet it is well-settled law that this defense will not be sustained upon a demurrer, when the bill distinctly charges fraud, and it appears that the complainants have instituted their proceeding within a reasonable time after their discovery of the fraud. Story's Equity Jurisprudence, Sec. 1520; *Michoud v. Girod*, 4 How. 503, 560; *Badger v. Badger*, 2 Wall. 87; *Baker v. Whiting*, 3 Sumner, 475.

The allegation here is that the complainants had no knowledge of the fraud until within three years before the institution of the suit, and then only a vague suspicion, and that they had no actual proof of it until within one year before the suit; and if this be true, there is certainly no unreasonable delay in the assertion of their rights. Whether they might not, with the exercise of diligence, have discovered the fraud at some earlier time may be a matter for consideration when all the circumstances are developed; but the reasons assigned in the bill for their failure to do so are at least plausible,

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especially when we consider the situation of the parties and the circumstances of the case. Moreover, if the right of the appellants to institute inquiry and to take action is to be dated from May 23, 1891, when Catharine Ann Whelan died and their title accrued, they would be far within the statutory period within which their title, if a legal one, could be enforced at common law, and within which, therefore, the doctrine of *laches* would enforce no bar in equity.

But we forbear to make any further comments on the law of the case at this time, inasmuch as anything which we might now say would have a tendency to embarrass its consideration, when the case shall have been fully developed by answer and testimony. All that we now decide is that in our opinion the bill of complaint sets forth a case which requires an answer and which should not be disposed of on demurrer. It may well be that the defense of *laches* will ultimately be made to appear to be a proper defense, and that the bill should be dismissed on that ground alone, if on no other. But such conclusion, if reached at all, should be reached only after the full discovery to be made by an answer and after such testimony thereafter as might be required and might be available. And it should be reserved to the defendants in the cause to make the defense of *laches* in their answer and at the hearing.

It is our opinion that the decree of dismissal should be reversed, with costs, and that the cause should be remanded to the Supreme Court of the District, with directions to vacate such decree, to overrule the demurrers interposed by the defendants, and to require the defendants to answer the bill of complaint, and for such further and other proceedings as may be just and proper and according to law. And it is so ordered.

An appeal to Supreme Court of the United States was prayed and allowed.

IN RE MILLETT.

PATENTS; ANTICIPATION.

1. An application for a patent is properly rejected upon a reference to a patent granted three days before the application was filed, where the patent, although not describing or claiming the invention, has annexed to it a drawing showing the invention; the failure of the patentee to include the device among the claims of his own invention, implying either that he abandoned it to the public, or that he regarded it as well known to the art. The patent is evidence of the state of the art at the time the drawings and specifications upon which it was afterwards granted, were made, and it is the state of the art and not the patent which constitutes anticipation.
2. Where an applicant for a patent claims a steam-gage having a tapering end so that it may be secured in plate without soldering, and a reference to a patent shows a similar gage, but contains no statement that solder is not used, the patent is an anticipation, there being no reason for assuming that the patentee intended to use solder in the absence of a necessity so to do.

No. 172. Patent Appeals. Submitted March 15, 1901. Decided May 21, 1901.

HEARING on an appeal by an applicant for a patent from a decision of the Commissioner of Patents, rejecting his application. *Affirmed.*

The facts are sufficiently stated in the opinion.

Mr. William H. Singleton for the appellants.

Mr. W. A. Megrath for the Commissioner of Patents.

Mr. Justice MORRIS delivered the opinion of the Court:

This is an appeal from a decision of the Commissioner of Patents wherein he refuses to issue letters patent to the appellants, Joshua H. Millett and Samuel G. Reed.

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The alleged invention is stated in seven several issues, not substantially different from each other, and which it is not necessary to consider separately. They are the following:

"1. In a steam-gage, the Bourdon tube and the part to which it is secured, the joint between the two being unsoldered and held solely by frictional contact, as explained.

"2. In a steam-gage, the Bourdon tube and the part to which it is secured, the joint between the two being unsoldered and held by frictional contact, as explained.

"3. In a steam-gage, the Bourdon tube and the part to which it is secured, the joint between the two being unsoldered and held by a frictional binding screw-joint connection, as explained.

"4. In a steam-gage, the Bourdon tube and the part to which it is secured, the joint between the two being unsoldered and tapering, as explained.

"5. In a steam-gage, the Bourdon tube, *D*, having the threaded tapered end, *d*, in combination with the head, *C*, having the correspondingly-threaded tapered opening, *c*², as explained.

"6. A Bourdon tube, having a reduced elastic portion and enlarged or reinforced threaded ends, in combination with a gage-case having threaded portions which engage the threaded ends of the tube.

"7. The Bourdon tube, *D*, having the reduced elastic body portion, *d*, and the enlarged or reinforced end portions, in combination with the gage-case having correspondingly-threaded portions."

As stated by the appellants in their application, the alleged "invention relates to an improvement in Bourdon-tube springs employed in steam or pressure gages, more especially to the means of connecting the ends of these tubes within a gage."

It seems to consist substantially in dispensing with the soldering of tin, lead, or other fusible material previously used for the connection with the joints, causing the joint to taper, and screwing it more tightly.

The application was filed on February 17, 1900. It was rejected by the primary examiner in an elaborate opinion on reference to a patent issued to one Frederick Lane on February 20, 1900, three days after the filing of the application of the appellants, but which patent had been applied for by Lane upwards of two years before. It was contended by the appellants that their application should not be rejected by reference to a patent issued after the filing of their application, in which their alleged invention, if shown at all, was not claimed, and only appeared in the drawing annexed to the patent; and further that this drawing did not show the invention of the appellants. This contention the primary examiner did not sustain; and his ruling was affirmed on appeal both by the board of examiners-in-chief and the Commissioner of Patents. And from the decision of the Commissioner the case has been brought to this court by appeal.

With reference to the first branch of the contention of the appellants, we are satisfied that the tribunals of the Patent Office were entirely right in the conclusion reached by them. If the drawings annexed to the Lane patent fully and satisfactorily show the device claimed by the appellants, and if these drawings were the same that were filed with Lane's application in the first instance — and we must assume that they were the same until the contrary is made to appear — it is very plain that they show anticipation of the invention of the appellants. It is of no consequence that Lane does not include this device among the claims of his own invention. His failure so to do simply implies either that he abandoned it to the public, or that he regarded it as already well known to the art. It does not help the appellants in any manner that he does not claim it.

It is not the fact that a patent was issued to Lane upon his application which constitutes anticipation in this case. Although that patent was issued in so short a time after the application of the appellants that, in view of the usual and necessary course of business in the Patent Office, we might fairly assume that the facts which justified its issue had

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been satisfactorily shown long before the advent of the appellants to the Office, yet the patent of itself would not be sufficient to show anticipation by Lane of the device of the appellants. But the fact which shows such anticipation is the state of the art at the time as evidenced by the drawings and specifications of Lane's application. For it is the condition of the art at the time at which an alleged invention is made, and not the existence of a patent, which in this connection is no more than evidence of the state of the art, which determines whether an invention claimed is actually an invention or not under the patent law. And this state of the art may be shown by a printed book, a periodical publication, a newspaper, anything in fact which can be regarded in law as reasonably sufficient proof of the fact. This we understand to be the rule deduced from reason and the authorities. See *Wright v. Yuengling*, 155 U. S. 47; 69 O. G. 639.

This proposition is not seriously, if at all, controverted by the appellants. Indeed, they seem to admit its correctness. Their argument is, that, while a drawing alone, if sufficiently plain and clear, may be sufficient to show an anticipation of the invention, yet the drawing in Lane's patent is not sufficient for that purpose. And this proposition, in view of the previous admission, necessarily means that the Lane drawing is not sufficiently plain and clear to show the invention in question. It is further conceded, however — at all events, it is not denied — that the joints of the Lane drawing have the tapering form which constitutes an element in the invention of the appellants; and so, in the ultimate analysis, the question of anticipation is narrowed down to the inquiry whether in the device shown by the Lane drawing the connection of the joints was effected by soldering or without soldering. The contention of the appellants is that, inasmuch as soldering had been generally used to connect the joints of the devices in previous use, therefore it is to be presumed or assumed that the Lane device also had soldering, notwithstanding that soldering was entirely unnecessary to it. But the specifications of the

Lane patent are wholly silent as to soldering; and inasmuch as such soldering was wholly unnecessary to its successful operation, it is not apparent to us why we should assume that to exist which had no reason to exist. If there was in fact a soldering in the device mentioned or shown in the Lane patent, and such soldering rendered that device essentially different from the invention of the appellants, it ought not to have been difficult to adduce some evidence of the fact. Whether, if shown, the fact of soldering would have differentiated the two devices, it is unnecessary for us to determine. The Commissioner of Patents was of the opinion that it would not have that effect.

The Commissioner of Patents has also remarked that the appellants have not availed themselves of the opportunity afforded to them by the rules of the Patent Office to show priority of invention in themselves by filing an affidavit to carry back their date of invention beyond the date of the filing of the Lane application. From their failure so to do it is just to assume that their invention did not antedate the date of the Lane application.

We see no reason to doubt the correctness of the conclusion reached by the tribunals of the Patent Office; and we are of opinion that the decision of the Commissioner of Patents should be *affirmed*.

The clerk of the court will certify this opinion, and the proceedings in the cause in this court to the Commissioner of Patents according to law. And it is so ordered.

MANNING

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY.

EQUITY JURISDICTION; CONSTITUTIONAL LAW; LEGISLATIVE POWER TO
REGULATE CALLINGS; TELEPHONE SERVICE; CORPORATIONS; CON-
TRACTS; BURDEN OF PROOF.

1. Where a telephone subscriber by a suit in equity for an injunction sought to compel a telephone company to continue furnishing him telephone service at a rate fixed by statute, which was less than the former rate charged by the company and paid by him, and to restrain the company from removing its instrument from his place of business, and a large mass of testimony was taken by the parties to determine whether the rate as fixed by law was reasonable, and the lower court, while expressing the opinion that the proper remedy was by *mandamus*, considered the case on its merits and dismissed the bill, and the defendant on appeal by the complainant to this court declined to raise the question of jurisdiction, it was *held* that this court would not of its own motion raise the question of jurisdiction, although upon consideration it might appear that the complainant had an adequate remedy at law.
2. The exercise of the legislative power to regulate callings affected with a public interest, is not dependent upon notice and hearing and it will be presumed that the legislature, in a given case, acted with due knowledge and fair consideration of all the facts and circumstances of the situation.
3. A telephone company incorporated under the laws of another jurisdiction and doing business in this District by sufferance only, may be compelled to perform its accustomed service at a rate fixed by Congress as a condition to its remaining and doing business here, although the rate so fixed may be wholly insufficient to meet the necessary expenses of the service to be performed.
4. Contracts of a corporation relating to loans, supplies, royalties and services are incidents of corporate existence and franchises; and all persons contracting with a corporation in those particulars do so subject to the dissolution of the corporate existence or the ter-

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mination of special franchises by limitation, by judicial decree or by repeal where that power exists.

5. One who invokes judicial relief against a statute regulating a calling affected with a public interest and fixing charges for services rendered, must show beyond a reasonable doubt that the enforcement of the statute will be destructive of property rights.
6. In considering the evidence and determining whether compensation for telephone service as prescribed by law is destructive of the property rights of an existing telephone company, the basis of estimation is properly the reasonable, actual value of the property used in the business, cost of maintenance and the expense of carrying on the business.
7. The testimony reviewed in a case in which a foreign telephone company doing business in the District of Columbia claimed that the provision of the appropriation act of Congress of June 30, 1898, making it unlawful for any telephone company doing business here to charge a greater rate for telephone service than that fixed by the act, was invalid as confiscating its property by fixing a rate for such service less than cost, and the opinion expressed that the evidence did not show that the necessary effect of the enforcement of the rate would be destructive of the company's rights of property.

No. 1008. Submitted March 21, 1901. Decided May 21, 1901.

HEARING on an appeal by the complainants from a decree of the Supreme Court of the District of Columbia, dismissing a bill in equity for an injunction. *Reversed.*

The COURT in its opinion stated the case as follows:

This suit was begun by the appellants J. Forrest Manning and Harry E. Rupprecht, trading as J. Forrest Manning & Co., in the Supreme Court of the District of Columbia to compel the Chesapeake and Potomac Telephone Company to continue to furnish them the ordinary service of the Washington telephone exchange upon payment of the annual rate prescribed in the act of Congress of June 30, 1898. This regulation of rates is contained in a proviso added to an item of the general appropriation bill of that date, and reads as follows:

"Provided, that from and after the passage of this act it shall be unlawful for any person or any telephone company

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doing business in the District of Columbia to charge or receive more than \$50 per annum for the use of a telephone on a separate wire; \$40 for each telephone, there being not more than two on a wire; \$30 for each telephone, there being not more than three on a wire, and \$25 for each telephone, there being four or more on the same wire." 30 Stat. 537, 538.

The Chesapeake and Potomac Telephone Company, then, as now, owned and operated the only telephone plant in the District of Columbia.

On July 1, 1897, plaintiffs entered into a contract with the defendant, whereby the latter agreed to furnish them its improved appliances, with special metallic circuit, for use in their business offices, and for which they promised to pay the sum of \$125 per annum, quarterly, in advance, and \$10 additional per annum for an extra desk cabinet equipment. By special provision the contract was declared to continue from year to year, subject to termination by either party, after the first year, upon ten days' notice.

Upon the passage of the aforesaid act plaintiffs gave notice of termination of the contract, and then, ten days later, notified defendant that they would retain the telephone equipment at the rate of \$50 per annum, as provided by law. They also tendered payment in advance at said rate. Defendant declined to accept payment at said rate on the ground that the same was less than the cost of service, but offered to continue at the former contract rate, or else to remove its telephone equipment from plaintiffs' office and discontinue their service. Alleging these facts, and renewing the tender of payment of the statutory rate, plaintiffs' bill prayed that defendant be enjoined from removing their telephone appliances, and from refusing or neglecting, when requested, to furnish them the usual telephone connections and service.

The defendant's answer averred that its service could not be maintained at the rate fixed by the act of Congress without actual loss, and denied the power of Congress to compel it to furnish the same for less than cost, because the effect

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would be the confiscation of its property. The temporary injunction prayed for was granted August 4, 1898. About fifty like suits were filed by other subscribers. These were practically consolidated with this suit, in which alone testimony has been taken, and made to abide its result.

A great volume of testimony was taken by the parties, and the cause came on to be heard February 5, 1900. The result was a final decree dismissing the bill, from which this appeal has been duly prosecuted.

The first public use of the telephone in the city of Washington was begun by Geo. C. Maynard late in the year 1878, under a contract with Gardiner G. Hubbard, trustee, for the agency and use therein of the inventions of Alexander Graham Bell. Maynard was made exclusive agent for the rental of the Bell telephones and call bells which were to be supplied to him. He was to erect lines, use diligence to bring the telephones into use and for compensation to receive a percentage of the rentals of instruments. A subsequent agreement ratifying the foregoing and extending it to certain other inventions controlled by the Western Union Telegraph Company was made with Maynard by the National Bell Telephone Company, which had in the meantime become the assignee of the Bell patents and others. About December 1, 1879, Maynard conveyed his plant, rights, etc., to the National Capital Telephone Company, a corporation created under the laws of West Virginia.

March 31, 1883, this company entered into a contract with the American Bell Telephone Company for the use of its telephones upon an agreed division of the proceeds of their rentals to subscribers.

Shortly after this the Chesapeake and Potomac Telephone Company was incorporated by the laws of the State of New York for the purpose of acquiring the property and consolidating the business of the National Capital Telephone Company, operating in the District, and of the Telephone Exchange Company, a corporation of West Virginia, then operating in Maryland. The capital stock of the Chesapeake and Potomac Telephone Company was fixed at \$2,650,000.

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On July 30, 1883, the National Capital Telephone Company, in consideration of \$750,000 of the capital stock of the Chesapeake and Potomac Telephone Company, transferred to the latter all of its plant, property and rights of every description.

At the same time the Chesapeake and Potomac Telephone Company acquired all the rights, property, etc., of the Telephone Exchange Company in Maryland. The consideration was the delivery of \$1,900,000 of the capital stock of the assignee. By the terms of the agreement of transfer \$630,000 of this stock was to be delivered to the National Bell Telephone Company and \$1,270,000 to the Telephone Exchange Company. Of this last \$100,000 was to be passed to trustees for the use of the Chesapeake and Potomac Telephone Company, and subsequently \$62,600 thereof was assigned to the National Bell Company aforesaid and \$37,400 sold in the market for the sum of \$24,546.67.

The actual value of the visible property received by the Chesapeake and Potomac Telephone Company under these conveyances was the following: From the National Capital Telephone Company, cash, bills receivable and supplies, \$77,334.93; plant valued at \$91,130.21. Total, \$168,465.14.

From the Telephone Exchange Company, cash, bills receivable and supplies, \$45,045.24. Plant valued at \$300,000. Total, \$345,045.24.

The difference between the face value of the stock — \$750,000 — delivered to the National Capital Company and the actual value of the property received — \$168,465.14 — is represented solely by the valuation of the franchises of the latter company at \$581,534.60.

The difference between the face value of the stock — \$1,900,000 — delivered to the Telephone Exchange Company and the actual value of the property received therefrom — \$345,045.24 — is represented solely by the franchises of the latter company, estimated, \$1,554,954.76.

The Chesapeake and Potomac Telephone Company, after taking over the property and franchises of the other corpo-

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rations, began to carry on the business in the District of Columbia, throughout Maryland and a small part of West Virginia. In conducting this business it has charged 40 per cent. of its general office expenses against the plant operated in the District, where its general office is kept. Since 1891 it has issued and sold \$500,000 of 6 per cent. bonds, two-fifths of which are also charged against the District plant.

Congress has passed no act incorporating the defendant, or giving it license to carry on its business in the District of Columbia.

The only recognition that it claims is to be found in certain items and clauses of appropriation bills, beginning with that of July, 1888. In that act it was provided, after an appropriation for telephone service, that the Commissioners of the District might authorize the wires of any "existing telegraph, telephone or electric light company now operating in the District of Columbia," to be laid under the streets, alleys, etc., "whenever in their judgment the public interest may require the exercise of such authority — such privileges as may be granted hereunder to be revocable at the will of Congress without compensation." 25 Stat. 323, 324.

An item continuing this authority for another term of Congress under the same condition was contained in the act of March 2, 1889. *Idem*, 804.

The act of August 7, 1894, authorized the erection and use of telephone poles in the public alleys, but the privilege was made subject to revocation at the will of Congress without compensation. 28 Stat. 256.

The act of March 3, 1897, provided that hereafter no wire shall be strung on any alley pole at a height of less than fifty feet from the ground at the point of attachment to said pole; and it was declared that nothing herein contained shall authorize the erection of any additional pole upon any street, avenue or reservation.

The usual condition of revocation at will without compensation was again added. 29 Stat. 678.

Appropriation bills subsequent to that containing the

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clause regulating charges merely appropriate money to pay defendant's accounts for services rendered. 30 Stat. 117; *Idem*, 126.

Mr. Arthur A. Birney, Mr. John J. Hemphill, Mr. H. F. Woodard and Mr. Arthur Peter for the appellants:

1. The appellee is not chartered by Congress, so there can be no claim of a contract right to pursue its business (which necessarily involves the use of public property) or to charge any particular rates. A New York corporation, it is here by sufferance only, yet it really denies to Congress the legislative control given by the Constitution. Had Congress chartered this company, and reserved (as in the cases of street railway, gas and electric light companies) the right of repeal of such charter, there could be no doubt of its right to terminate all powers of the company; compel it to remove its conduits, cables, wires and poles from the public ways, and thereby destroy its business and convert its corporeal property into old junk. Because the company has no contract, but only a bare permission to pursue its business, does it stand in better position to deny to Congress the power of control? Is the reserve power which Congress would now have, had it *authorized* the company's operations, nonexistent because it has *permitted* them? Would not Congress now have the legal right by direct legislation to exclude this foreign corporation from doing business in this District? If yes, then even though the untrue contention that this act of general legislation will *indirectly* effect the same result be established, how may it be claimed that this is unlawful? By what means has this foreign corporation secured vested rights to conduct its business at a profit in this District? That a foreign corporation does business only through comity and not by right is well settled. *Paul v. Virginia*, 8 Wall. 168; *Phil. Fire Ins. Co. v. N. Y.*, 119 U. S. 110, 119; *Pembina Mining Co. v. Penn.*, 125 U. S. 181. As well illustrating the completeness of the sovereign power of Congress in the premises, see *Mormon Church v. U. S.*, 136 U. S. 1.

2. The remedy is by injunction, not by *mandamus*. The denial of jurisdiction and assertion that the proper remedy in such cases as this is by *mandamus* was a surprise, since the proposition was not asserted by the answer or suggested by counsel or the court during the argument before the lower court. Had the learned judge suggested it he would have learned that at the time of the filing of this bill one O. G. Staples took action by *mandamus* to compel defendant company to furnish him telephone service, and that his petition was denied on the ground that the statute in force here authorizing a traverse of the return to the writ and trial of facts applies only to proceedings to try the right to public office, and does not extend to proceedings to secure private rights even from a public-service corporation. Stat. 9 Anne, Ch. 20; Alex. British Stat. 693. At common law, and until 1831, in Great Britain, except in the cases covered by the statute of 9 Anne, there was no right to traverse the return to the writ of *mandamus*. Moses on *Mandamus*, 203, 214; Tapping on *Mandamus*, 422, 481.

No statute has been passed to extend the right here, as has been generally done in the States. The application here is to enjoin the defendant from taking from the premises of complainant the telephone therein, and from neglecting or refusing to furnish telephone exchange service as heretofore; it distinctly differs from the cases cited by the court, such as that from Maryland (66 Md. 399) where the application was for a *mandamus* to compel the telephone company to put up a telephone and its appliances and render service. Both the preventive and mandatory injunctions may be included in one decree. 1 Beach on Injunctions, Sec. 97. The mandatory injunction is growing in favor, and the same caution, and no more, is required in the granting of either the preventive or the mandatory injunction. 1 Beach on Injunctions, Sec. 101. See also *Broome v. N. Y. & N. J. Tel. Co.*, 42 N. J. Eq. 141; *Webber v. Gage*, 39 N. H. 182 and 196; *Vincent v. RR. Co.*, 49 Ill. 33, 43 and 44; *Lane v. Newdigate*, 10 Vesey, p. 193; 2 Redfield on R'ss, Sec. 221; *Lucas v. Cumerford*, 1 Vesey, Jr. (Sumner's Ed.) 235, note 2; Mil-

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ler, J., in *Chicago, etc. v. Minn.*, 134 U. S. 460; *Smyth v. Ames*, 169 U. S. 517, 518. The suggestion that an action for damages would be an adequate remedy cannot be accepted. By what evidence would damages be calculated?

3. Congress has the right to regulate charges by direct legislation. That the defendant company is a public-service company, subject to be controlled in its rates within reasonable bounds by Congress, is not denied by the answer, and must be conceded. When property is affected with a public use, "the business in which it is used is subject to legislative control. So long as the use continues the power of regulation remains, and the regulation may extend, not merely to the provisions for the security of passengers and freight against accident and for the convenience of the public, but also to prevent extortion by unreasonable charges and favoritism by unjust discriminations. This is not a new doctrine, but an old doctrine, always asserted whenever property or business is, by reason of special privileges, received from the Government, the better to secure the purpose to which the property is dedicated or devoted, affected with a public use." 128 U. S. 179. This doctrine has been declared applicable to telephone companies; *Hockett v. State*, 105 Ind. 250; *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1; *Johnson v. State*, 113 Ind. 143; *Central Union Tel. Co. v. State*, 118 Ind. 194; *State v. Bell Tel. Co.*, 36 Ohio St. 296; *Ches. & Pot. Tel. Co. v. Balt. & Ohio Tel. Co.*, 66 Md. 399; *State v. Nebraska Tel. Co.*, 8 Am. & Eng. Corp. Cases, 1; to elevators and warehouses; to railroads; to street railroads; to canals; to ferries; to toll roads; to wharves; to natural gas companies; to water supply companies; to mills, and to various other kinds of business. See cases collected in note 38 L. R. A. 177. The decisions in the Supreme Court are: *The Granger Cases*, 94 U. S. 113, 164, 179, 180; *Ruggles v. Illinois*, 108 U. S. 526; *RR. Com. Cases*, 116 U. S. 307, 347, 352; *Dow v. Beidelman*, 125 U. S. 680; *Georgia RR., etc., v. Smith*, 128 U. S. 174; *Chicago, etc., RR. Co. v. Minnesota*, 134 U. S. 418; *Minn. R'way Co. v. Minnesota*, 134 U. S. 467; *Chicago RR. Co. v. Wellman*, 143 U. S. 339;

Budd v. N. Y., 143 U. S. 517; *Brass v. Stoevers*, 153 U. S. 391; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *RR. Co. v. Gill*, 156 U. S. 649; *Corington, etc., Turnpike Co. v. Sanford*, 164 U. S. 578; *Smyth v. Ames*, 169 U. S. 466; *San Diego Land Co. v. National City*, 174 U. S. 757.

4. The power of Congress to impair contracts. The court below denied to Congress the power to impair the obligation of contracts "except in a case where it is given express power to legislate on a given subject." No authority is cited for this opinion, and it is distinctly at variance with the views of the Supreme Court. *Legal Tender Cases*, 12 Wall. 550. That Congress, having the right to legislate at all upon the subject, has the power to directly or indirectly impair the obligation of contracts, is now too well settled to admit of further discussion. *McCullough v. Maryland*, 4 Wheat. 405; *Legal Tender Cases*, 12 Wall. 457, 501, 523, 539, 547; *RR. Co. v. Iowa*, 94 U. S. 155, 157, 159; *Sinking Fund Cases*, 99 U. S. 718; *Mitchell v. Clark*, 110 U. S. 643. The only limitation upon the rights of the States to impair the obligations of contracts within their borders is found in the Federal Constitution. Before the adoption of that Constitution they might and did so legislate, the courts not recognizing any natural obstacle. Argument of Mr. Potter in *Legal Tender Cases*, p. 503; *Owings v. Speed*, 5 Wheat. 420.

5. The statute applies to all telephones. The contention of the answer that the statute applies only to telephones used by the District of Columbia is without force. That the intention of Congress was to regulate the charges to all users is manifest. The fact that the legislation follows the word "provided" cannot affect the question. *Georgia Banking Co. v. Smith*, 128 U. S. 181.

6. The burden of proof as to rates. The legal presumption being in favor of the validity of the statute, the burden was upon the defendant to establish its invalidity *as an inevitable conclusion, and beyond a reasonable doubt*. It was bound to show "a repugnancy to the supreme law of the land too clear to admit of dispute." *Pine Grove v. Talcott*, 19

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Wall. 666; *Legal Tender Cases*, 12 Wall. 531; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 615.

We cannot but think that this rule was lost sight of by the judge below, who dealt with the facts as though to determine the preponderance of proofs. The courts will not lightly declare an act of Congress void, and in this case the burden was upon the defendant to prove *beyond a reasonable doubt* that the rates fixed by the act are so low as to make that act unconstitutional. *Smyth v. Ames*, 169 U. S. 466; *San Diego Land Co. v. National City*, 174 U. S. 739; *Covington Turnpike Co. v. Sanford*, 164 U. S. 578.

In the court below counsel for defendant earnestly insisted that the rule that before declaring a statute unconstitutional the court must be so satisfied beyond a reasonable doubt, applied only to questions of law and not to questions of fact. There is not only no such distinction in the application of the rule, but it will be observed that in the last two cited cases in the Supreme Court the questions before the court were questions of fact only. Counsel for the defendant in his argument below cites the case of *Reagan v. Trust Co.*, 154 U. S. 411, to show that the court calls attention to the fact "there are \$15,000,000 of bonds outstanding and there is not sufficient income to pay the operating expenses and pay the interest on the bonds." That case can hardly be held as an authority here because the conditions in the two cases are so diametrically opposed.

7. In determining the question of the validity of the statute fixing rates we have the right to consider the probable increase of business at the lower rates, for all experience suggests the probability that a reduction of rates will increase the amount of business, and therefore the earnings. *Smyth v. Ames*, 169 U. S. 466; *Chicago v. Wellman*, 143 U. S. 339.

8. Not only has the defendant company failed to demonstrate beyond a reasonable doubt that the statute rates are so low as to amount to confiscation of its property, but it is affirmatively established by the evidence* that these rates

*The appellants' brief and that of the appellee contain exhaustive analyses of the testimony, which are too lengthy to be inserted in this report.—REPORTER.

are much in excess of what is necessary to the payment of all expenses of maintaining and operating the plant and the return of fair or even large dividends upon the value of the property to those who hold its bonds and stock.

Mr. J. M. Wilson, Mr. A. S. Worthington, Mr. E. W. Van Dyke and Mr. Charles L. Frailey for the appellee:

1. Because the defendant is a foreign corporation its property is not subject to confiscation at the will of Congress. Fifth and Fourteenth Amendments to the Constitution of the United States. The Supreme Court of the United States has several times held that while the legislature of a State may prescribe rates to be charged by any "public-service" corporation, an act fixing such rates will amount to confiscation, and will for that reason be held void by the courts if the rates be insufficient to enable the corporation to pay its expenses and earn a reasonable compensation for the service rendered. *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *Railroad Commission Cases*, 116 U. S. 307; *Smythe v. Ames*, 169 U. S. 466; *San Diego Land Co. v. National City*, 174 U. S. 739; *Covington, etc., Turnpike Co. v. Sandford*, 164 U. S. 578, 595.

Until the present case, so far as we know, a similar question has not arisen as to the powers of Congress as limited by the language of the fifth amendment. But it is manifest that the same effect must be given to the language of the fifth amendment in dealing with acts of Congress that had been given to the corresponding provision in the fourteenth amendment in dealing with the acts of the legislatures of the several States.

Counsel for the complainants in their brief in this court for the first time in this case suggest that the property of this defendant may be confiscated by Congress, because it is not incorporated under any act of Congress or under the general incorporation law of the District, but is a New York corporation. They seem to have found no authority in support of this contention.

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Argument of Counsel.

It is asserted in the brief that the defendant "is here by sufferance only." In their bill of complaint the complainants say that the defendant "has, with the assent and under the direction of the Congress of the United States and of the Commissioners of the District of Columbia," established its plant in the District. There are many acts of Congress, some of which expressly and others by necessary implication authorize the defendant to carry on the telephone-exchange business in this District. It does not, however, seem to us that in this respect it can make any difference whether a public-service corporation organized under the laws of one of the States of this Union, lawfully carrying on its business in the District of Columbia, is doing so by the express consent or merely by the implied acquiescence of Congress. It is a well-known fact that nine-tenths of the corporations doing business in this District are organized under the laws of Virginia or West Virginia, or some of the other States. All our steam railroads in the District are operated by foreign corporations. Nearly all of our street railroads are controlled and practically owned by a Virginia corporation. All these corporations are here "by sufferance" in the same sense in which the defendant may be said to be here.

The States undoubtedly have the power to exclude foreign corporations altogether. Doubtless Congress has the same power in this District, but is it not too plain for argument that when a foreign corporation lawfully establishes its business and acquires property in this District it is entitled to the same protection as corporations organized under the laws of the District? Might it not as well be said that a citizen of New York who comes here is without the protection of the Constitution?

The only case we have found in which such a question as this has been raised is the case of *Chicago & Northwestern Railroad Company v. Dey*, 1 L. R. A. 744-752-754. See the opinion in that case.

2. The validity of the act upon which this suit is based depends, not upon whether the average expense of the defendant per subscriber is within the rates fixed, but upon whether

the most efficient equipment and service, such as are received by the complainants in this case, can be rendered at those rates.

3. The act is void because it impairs existing contracts. This question is presented in two aspects. In the first place, with each of its subscribers the appellee had written contracts, which by their terms were to continue in force until terminated by a ten days' notice given by one party to the other. A number of the complainants brought their suits without giving any such notice, and the contracts are, therefore, still in force, unless terminated by this act of Congress. A clearer attempt to "impair the obligation of a contract" by a legislative act could hardly be imagined.

In the second place, the Government itself, through its several departments in Washington, and through its agent, the District of Columbia, entered into a number of such contracts with the defendant. With a large number of its telephones, the Government, like the complainants in this particular case, had extra equipment, and had contracted accordingly to pay an extra rate, the total annual price which the Government agreed to pay for this service with extra equipment in many cases running as high as from \$140 to \$500, the last-mentioned figure being the rate paid by the Government Hospital for the Insane.

Thus, by this legislation, Congress attempts, not only to impair the obligation of contracts between others, but to relieve the Government itself from its own obligations, not as to the past merely, but indefinitely throughout the future.

Opposing counsel claim that Congress has the right to impair the obligation of any contract whatsoever in this District and, necessarily, everywhere else under the exclusive jurisdiction of Congress. They say that the power of Congress to impair the obligation of contracts, *directly or indirectly*, "is now too well settled to admit of further discussion."

The cases in the Supreme Court of the United States which they cite in support of this proposition in nowise sustain their contention. Those cases merely hold that where

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Congress is given the power to declare what constitutes a legal tender, or to enact a bankrupt law, or to declare war, or to enact a statute of limitations applicable to suits transferred from the State courts to the courts of the United States, the fact that the payment of a debt in such legal tender, or the discharge of a bankrupt, or the continuance of hostilities, or the expiration of the time within which a suit may be brought, will *indirectly* prevent a creditor from collecting a debt, and so will, in a certain sense, impair the right to enforce a contract, will not prevent Congress from exercising that power. But the court is careful to place these decisions on the ground that the power to do the thing which so indirectly impairs the obligation of a contract is given to Congress by the Constitution.

But the law which is under consideration here *directly* impairs the obligations of the contracts between the defendant company and each of its subscribers, including the Government itself. If the act had said in so many words, "Telephone subscribers who have agreed to pay \$125.00 or \$100.00 per annum, shall hereafter, notwithstanding their contracts, pay not more than \$50.00," the effect as to contracts in force at the time would be precisely what the effect of the law as it stands will be if the position of the complainants here is sustained by the court. See *Legal Tender Cases*, 12 Wall. 457; *Union Pacific Railroad Company v. United States* — the "*Sinking Fund Cases*," 99 U. S. 700; *Calder v. Bull*, 3 Dall. 388; *Fletcher v. Peck*, 6 Cranch, 87; *The Territory v. Reyburn*, 1 Kan. 551-557.

4. The act is void because the rates were fixed, not only without giving the defendant an opportunity to be heard, but without even any preliminary *ex parte* investigation as to what would be reasonable rates for the service required of the defendant. See *Chicago, etc., Railway Company v. Minnesota*, 134 U. S. 418.

Surely it must, at least, be admitted that rates fixed without notice to the party affected, and without even a one-sided investigation into the matter, are not to be held presumptively reasonable till shown beyond a reasonable doubt to be unjust.

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Counsel for the appellants insist that we are wrong in our contention that the doctrine so often laid down by the Supreme Court, that doubts as to the constitutionality of State legislation or of acts of Congress will be resolved in favor of the validity of such laws, applies where questions of law only are involved. Yet it is to be observed that, of the five cases cited on this point by counsel for the appellants, three — the cases in 12 Wall. 531, 19 Wall. 666, and 173 U. S. 615 — involve questions of law only. In the other two cases — *Smyth v. Ames*, 169 U. S. 466, and *San Diego Land Company v. National City*, 174 U. S. 739 — the State statutes involved provide for a regular judicial proceeding, and there actually was such a proceeding before the rates complained of in those cases, respectively, were fixed.

It may well be that when a legislature has deferred the fixing of rates to a commission or board of some kind, and that tribunal, before fixing them, has fully heard and considered all that the public-service corporation affected can offer by way of evidence or argument, the courts will require a very clear showing that the rates are unjust before they will interfere. But such a doctrine can have no application where the commission or board acts without notice to the party chiefly concerned; and when the legislature itself undertakes to arbitrarily fix the rates, without any investigation or hearing whatever, its act is as void, we submit, as it would be if it undertook to take land for public use and, at the same time, fix the price to be paid for it.

5. A telephone exchange supplying reasonably efficient service to all parts of the District of Columbia cannot be maintained and operated without loss at the rates fixed by the act of June 30, 1898. We do not concede that, in considering the validity of the statute in question, the particular situation of the appellee should be dismissed from consideration. Appellants contend that, even if appellee will necessarily sustain a loss by doing business at the statutory rates, it must accept those rates because it is said that some other company, with different apparatus, could render the service required and make a reasonable profit. If the case required

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it, we should insist that, since the exchange operated by the defendant is the only exchange plant that has ever been established in the District, and since no other exchange could be established without affirmative action on the part of Congress, it must be assumed that the act of June 30, 1898, was intended to apply to the defendant company and to no other person or corporation. But this, as it seems to us, is a moot question, because, as we confidently submit, the evidence in this case upon which we rely to show that the act in question, if enforced against the defendant company, would be a virtual confiscation of its property, also demonstrates that the act would have the same effect upon any other company that would undertake to render service of the same class to the people of the District of Columbia. Under the conditions that exist in this District, it is impossible to operate a telephone exchange connecting together subscribers all over the District for an average annual compensation of considerably less than \$50 per subscriber. The evidence, which shows that the defendant would be ruined by attempting to carry on its business at the rates fixed by the statute, will show that the business cannot be carried on at all without a loss unless the rates are far higher than the maximum rate allowed by the act of Congress in question.

6. The business of the defendant has been economically conducted and its books of account have been properly kept. It is established by the uncontradicted evidence in the case that the defendant has conducted its business in as careful and economical manner as possible; that the heads of its several departments are faithful and competent men; that in making all its purchases of material, wherever competition is possible, it buys from the lowest responsible bidder; that in its purchases, where competition is impossible, it gets as low rates as any other purchaser, and has a special contract by which, if prices go down, it is to get the benefit of the reduction, and if they go up its rates are not to be affected; that all material is carefully accounted for, being charged to the storekeeper when received by him and duly receipted for by the heads of the departments to whom it is delivered,

and generally that every possible safeguard is thrown around its financial transactions, so as to keep its expenditures at the lowest point consistent with good service.

7. The books of account of the defendant and the original vouchers have been thoroughly examined by the most competent experts in the United States, and the details of its receipts and expenditures for a period of nearly seven years are before the court.

8. The books of account of the defendant and the statements made up from them by the accountants show that the regular and ordinary expenses of operating and maintaining the defendant's exchange require a greater expenditure per telephone than even the maximum rate fixed by the statute.

9. The public and the stockholders of the defendant company are not the only parties interested; but, in fact, those having the most direct and immediate interest are the bondholders. They have the first lien on the property of the defendant. If it is ruined, their security is gone. The bonds have been on the market for several years, and in the ordinary course of business have gone into the hands of many investors. Yet, though their rights are paramount, they have never been heard — have never had an opportunity to be heard. As to their rights, see *Smyth v. Ames*, 169 U. S. 466; *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866, 879.

10. As to the claim that, with lower rates, there will be more subscribers, and that, as the number of subscribers increases, the cost per subscriber decreases: The complainants urge that, even if with about 2,200 subscribers, the statutory rates are too low, yet that, if those rates were adopted, there would be a great rush of new subscribers, increasing the total number to 8,000 or 10,000, and that this great increase in subscribers would enable the defendant to profitably carry on a business that might not be profitable with but 2,200 subscribers.

Counsel do not tell us how the defendant is to be made whole for the loss it would sustain, even on this theory, during the interval between the enactment of the law and the taking into the exchange of these thousands of new sub-

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scribers; nor do they make any provision for the difficulty that would arise if the defendant should accept the statutory rates depending upon this tremendous influx of new subscribers, and should be disappointed in such expectation.

It seems reasonably clear that rates which a public-service corporation is bound to accept instanter must be such as are reasonable at the time they go into effect, but we need not discuss that question, because it has been settled for us by the Supreme Court in *Smyth v. Ames*, as that case is reported in 171 U. S. 361. In delivering the opinion there reported, it is said:

"Of course the reasonableness of a schedule of rates must be determined by the facts as they exist when it is sought to put such rates into operation."

But the evidence in this case shows beyond peradventure that, as the number of subscribers in a telephone exchange increases, the cost per subscriber does not decrease, but increases. We do not mean to say that this holds good in every exchange and with every increase, but that in the long run, and wherever the increase is substantial, this is the necessary result. The history of this exchange in Washington shows that that has been the result here.

11. As to the evidence relating to telephone service and rates in other cities: Avoiding the District of Columbia and the conditions under which telephone service must be rendered here, the complainants' counsel proceeded to journey from city to city, starting at Detroit and winding up at Norfolk, taking testimony about telephone rates and plants in other cities. All this evidence came in subject to objection. They seemed to take it for granted, and, indeed, in their brief in this court, they now contend that when they have shown that in some other place some telephone company is doing business and charging rates less than those fixed by this act of Congress, the presumption arises, without evidence, that these companies are doing business at a profit, and that the burden is cast upon the defendant to show that the conditions under which such companies render service are so different from the conditions under which the busi-

ness must be carried on in the District of Columbia, that rates which will pay in these cities will not pay here.

On this point we do not agree with our opponents. After evidence so full and satisfactory, showing that, in the District of Columbia, efficient telephone service cannot be rendered at anything like the rates fixed by the statute, has been placed before the court by the defendant, it certainly cannot be that that evidence is met or its weight affected by simply showing that in certain cities rates as low or lower are in force. Of what avail, for instance, would it have been if the complainants had shown, as they easily might, that in a hundred small towns throughout the United States telephone service is furnished for from ten to twenty dollars per annum. To be of any force, we submit it would have to be shown that telephone service is rendered in other cities, *under like conditions and at a profit*, at rates not exceeding those fixed by this act of Congress. See *Smyth v. Ames*, 169 U. S. 466.

12. The question before the court is, not whether the existing rates are too high, but whether the rates fixed by the statute are too low. The average rates under the statute are only about one-half of the average of the existing rates, and, while we deny that, under existing rates, the defendant can earn anything more than a fair compensation for its service, as we think has been shown above, yet it is apparent that showing that the present rates are too high is a very different thing from showing that the rates fixed by the statute are not too low. Indeed, on its face, the proposition that the defendant, while limiting its dividends for the fifteen years during which it was in existence, from August, 1893, to November, 1898, to an average of less than 3 per cent. per annum, should, in fact, have been making the enormous profit claimed, is incredible. But, certainly, it is an immaterial question here whether the defendant, during those fifteen years, earned more than a fair profit. If the statute had left to this court, or to a board or commission of some kind, the investigation of this subject and the determination of what are proper rates, then it would have been important

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to inquire whether, under existing rates, more than a reasonable profit can be earned. But this court is given no power to determine what are fair rates. It has no power to consider that subject. It cannot inquire whether more than a fair profit is now being earned, and, finding that it is, reduce rates so that only a fair profit shall result. It has simply to inquire whether, at an average rate of less than \$50 per annum, the reasonable expenses of carrying on the business can be met and a fair compensation in addition realized by the defendant.

13. We are not concerned in this case with the financial operations of the defendant prior to July 30, 1898, except as they may have some bearing on the question of what would be fair rates on and after that date. It is of no consequence, we submit, whether Mr. Maynard and his successors, between 1878 and August 1, 1883, made dividends or what amount of capital they invested, and so it is of no consequence what proportion of the proceeds of the defendant's bonds were expended in the District of Columbia and in Baltimore. It is of no consequence whether the abandonment of the solid system of conduits and the substitution of the drawing-in system was a wise measure or not. It is of no consequence, indeed, what proportion of the defendant's plant, as it stood when the act in question was passed, had been paid for out of earnings or out of bonds or by contributions from the stockholders. There was, on that day, a certain plant in existence here furnishing telephone-exchange service to the public, and the only question, we submit, is whether, at that time, with the plant as it stood, the service required could be rendered at the statutory rates and leave a reasonable profit to the defendant. If the whole plant had been obtained by some fraud or trickery, and had not cost the defendant a cent, the question would be precisely the same. We are not concerned here with the question how the plant was procured, but with the question of what it will cost to operate it.

14. The evidence as to what is the necessary cost of building and of operating and maintaining such an exchange in

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Washington all points in one direction. Nowhere will be found the testimony of any witness, who knows what is required here, that the rates fixed by this statute are not impossible.

It is a rule of courts of equity where questions of fact have been referred to a master (or an auditor) to presume, in the first instance, that his findings as to such questions are correct. The learned justice who decided this case in the court below, instead of referring it to an auditor himself, practically performed the duties of a master. The result was that the court reached the conclusion that, beyond all reasonable doubt, the defendant can do business at the rates fixed by this statute only at a loss. This finding, we submit, should have, at least, the benefit of that presumption in its favor which would obtain if the case were on hearing on the report of a master. It is impossible, in an appellate tribunal, to fully present the many details of the evidence in such a case as this. It is impossible that an appellate court should take the time to enter into all these details; yet this is a case in which everything depends upon the details. Two accountants of the highest standing and of unquestioned probity, having found from an examination, occupying many weeks, that the expense attending the operations and maintenance of the telephone exchange in the District will greatly exceed the rates fixed by this statute, even without any allowance for depreciation, the complainants, if they believed this conclusion to be incorrect, should have given the court the benefit of the results of a similar examination reached by competent accountants selected by themselves. Having failed to do this, and the conclusions of the accountants having been confirmed after a long and patient investigation by the court below, the members of this court should not be asked to perform themselves the duties of accountants, not only as to the business of the defendant company, but of a dozen other companies in the United States and Canada, but the decree below should be affirmed because it has not been shown to be wrong.

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Mr. Justice SHEPARD delivered the opinion of the Court:

1. No objection was taken to the bill in the court below for want of jurisdiction, and all the suits depending upon this, save one, were brought upon the assumption that the appropriate remedy was through appeal to the restraining power of a court of equity. It seems that one party, similarly situated, did file a petition for a writ of *mandamus*, which was denied.

It is true that the learned justice who presided at the hearing of this cause expressed the opinion that the proper remedy was by *mandamus*, but he did not dismiss the bill on that ground. He proceeded to consider the case on its merits, and dissolved the injunction and dismissed the bill because he found the rates imposed by the statute to be unreasonably and oppressively low.

Notwithstanding that expression of opinion, the appellee has declined to raise the question of jurisdiction on this appeal by suggestion even, and has confined itself to the main question. The case has been depending since July 14, 1898, and the parties have incurred great expense in taking a mass of testimony that covers about 1,100 pages of the printed record.

Taking all of this into consideration, as well as the technical character and limited scope of the action of *mandamus*, we are not inclined to raise the question of jurisdiction of our own motion, notwithstanding we might find, upon consideration, that there is an adequate and complete remedy at law for the right sought to be enforced.

2. In respect of the nature of its use there would seem to be no ground for distinction between the business of a telephone exchange and that of a telegraph or transportation company. It likewise serves and promotes the public interest, and, moreover, occupies and makes use of the public streets and highways by the express or implied permission of the State.

The regulation of callings affected with a public interest, including charges for services rendered, is an undoubted

function of the legislative department, and the courts have no right to inquire into the amount of information possessed by the legislative department or to pass judgment upon the motives that may have prompted the exercise of its powers. Consequently we must pass by as irrelevant the argument on behalf of the appellee, founded on the journals of Congress and proceedings of committees of investigation, to the effect that the regulation in question was hastily adopted as a "rider" upon a general appropriation bill, without notice to or hearing of the defendant, without knowledge of the conditions of its service and in disregard of its interests and rights.

The exercise of the power of regulation was not dependent upon notice and hearing, and we are bound to presume that Congress acted with due knowledge and fair consideration of all the facts and circumstances of the situation which it undertook to effect.

3. On the other hand, it is equally well settled that, whilst the legislative power is inherent and its exercise a matter of wide discretion in respect of the regulation of the conduct and charges of a business affected with a public interest, the one is not paramount and exclusive, and the other is not so conclusive as to preclude judicial inquiry into the effect of a given regulation upon the substantial rights of property of the persons affected.

The courts will make this inquiry and will forbid enforcement when it plainly appears that the regulation violates a binding contract, or is tantamount to the deprivation of property without due process of law, or to its taking for public use without just compensation. *San Diego Land Company v. National City*, 174 U. S. 739, 754, and cases cited.

4. It is unnecessary to consider whether Congress, in the exercise of its plenary power as the sole legislative authority in and for the District of Columbia, is under limitation in respect of power to impair the obligation of contracts in the sense that the same is denied to the States by express provision of the Constitution. No such question is presented

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by the record. The defendant holds its franchise as a corporation by grant of the legislature of the State of New York.

Thus incorporated, it came to the District of Columbia and commenced a business of a public nature without invitation or express permission.

Congress entered into no contract with defendant after its entry and has conferred no franchise upon it; nor has it attempted to annul or curtail the corporate franchise held under the authority of the State of New York.

No implied contract, having legal obligation, can possibly arise out of defendant's entry and commencement of business without obstruction or apparent objection. The United States are under no estoppel. We have seen, in the provisions of statutes heretofore quoted, that each time the Commissioners of the District have been authorized to permit the laying of conduits in the streets and the erection of polls in public alleys it has been with the express reservation of the right of revocation "at the will of Congress and without compensation."

Even if the defendant had been incorporated by act of Congress and specially granted the right to carry on business in the District of Columbia, it would, probably, without a reservation similar to the foregoing, and certainly with it, be subject to repeal or revocation at will. In such event all that would remain to the representatives of the corporation would be the right to take away its cables, poles and other movable property for utilization elsewhere or in some other way. And Congress might also grant a franchise to some other corporation with the right to take and use the cables and poles of the defendant, provided that provision be made at the same time for the regular ascertainment and prompt payment of just compensation for the property taken. *Greenwood v. Freight Company*, 105 U. S. 13; *Thornton v. Marginal Freight Company*, 123 Mass. 32.

5. Being a foreign corporation doing business in the District of Columbia upon sufferance — a mere occupant at will, without the protection of contract or vested right —

the defendant could be either expelled or permitted to remain upon any conditions whatever, at the will or pleasure of Congress. Power in this respect is, at the least, co-extensive with that established beyond all question as belonging to the legislatures of the States. *Paul v. Virginia*, 8 Wall. 168; *Waters-Pierce Oil Company v. Texas*, 177 U. S. 28.

Congress has not exercised this undoubted power of expulsion in the case of the defendant or commanded it, by name, to perform its accustomed services at the fixed rate as the condition of its remaining and doing business in the District. The regulatory act is general in its terms and applies to "any person or any telephone company doing business in the District," but the defendant is the only person, or company so engaged, and, for the time being at least, the regulation can only have application to it. The substantial effect of the act is to impose the statutory rate as the condition of further toleration. The act is mandatory and the intent of Congress is practically the same as if it had said to the defendant: "Accept this rate or withdraw from the District." Congress could not, and did not, undertake to compel the defendant to remain in occupation of the field of operations and carry on business at the imposed rate against its will.

If the defendant, convinced that the rate fixed by law is ruinously low, had suspended its business and abandoned all operations within the District, Congress would have no power over it other than to compel it to remove its obstructions from the streets and other public places. Nor would the courts, in such event, have any power to compel the defendant to give its services to any person. But the defendant cannot remain and carry on its former business in defiance of the law. Persisting in its business, it must be regarded by the courts as accepting the condition and coming under obligation to perform its services at the statutory rate. So persisting and at the same time refusing obedience, it is within the judicial power to compel defendant to observe the rate fixed by Congress until such time in the future as it may voluntarily withdraw from business or Congress may relieve.

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According to this view of the defendant's rights and obligations, the preliminary injunction was properly granted, and should have been perpetuated upon final hearing, with the limitation before suggested.

6. It has been further contended on behalf of the appellee that the act of Congress is unconstitutional, because it impairs the obligation of contracts entered into by the defendant with other persons. If the act of Congress undertook to annul or destroy contracts in the nature of grants of private property or vested interests, the power might well be denied, not by virtue of any express prohibition of power to impair the obligation of contracts, but because such an act might be regarded as the usurpation of judicial power, as well as the deprivation of property without due process of law, or taking the same without provision for just compensation. No such contracts are in question here. All other contracts of the defendant, relating to loans, supplies, royalties and services, are incidents of corporate existence and franchises. All persons contracting with a corporation in these particulars do so subject to the dissolution of corporate existence or the termination of special franchises by limitation, by judicial decree or by repeal where that power exists. *Mumma v. Potomac Co.*, 8 Pet. 281, 287.

All that remains of such contract obligations is the right in equity to their enforcement, when practicable, against the available property of the corporation in the act of winding up its affairs.

7. What we have before said respecting the power of Congress to prescribe an arbitrary service rate as the condition of defendant's right to do business in the District has been upon the assumption, as charged in the answer, that the rate is ruinously low, that is to say, wholly insufficient to meet the necessary and legitimate expenses of the services to be performed.

Due respect to the legislative department, whose action is assailed, and perfect harmony with the principles upon which the right of judicial inquiry and interference in such instances is founded, require that one invoking judicial relief

shall show beyond reasonable doubt that the enforcement of the regulation will be destructive of property. *San Diego Land Co. v. National City*, 174 U. S. 739, 754, and cases cited.

Moreover, the facts from which the conclusion is to be deduced are complex and peculiarly within the knowledge of the party complaining. If statements and calculations of cost, expenditure and so forth are misleading or untrue, they often cannot be contradicted, and if uncertain and involved, rarely admit of elucidation by the opposing party.

In considering the evidence and determining whether the compensation prescribed by law is destructive of property, the basis of estimation in a case like this will ordinarily be the reasonable, actual value of the property used in the business, cost of maintenance and the expense of carrying on the business properly. *San Diego Land Co. v. National City*, 174 U. S. 739, 755, 757. In the language of Mr. Justice Harlan in that case: "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used by the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed, and which went into the plant, may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public."

The basis of actual value is peculiarly appropriate in this case.

As before stated, the defendant corporation was organized for the express purpose of acquiring and consolidating the business of separate organizations operating in Maryland and the District of Columbia. Its capital stock of \$2,650,000 was not issued for money subscribed, but in payment for those properties; \$1,900,000 was passed to and divided between the Maryland company and the American Bell Company, and \$750,000 was delivered to the National Capital Company.

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The actual value of the property received in exchange, as shown by the statements of the experts and derived from the defendant's books, was, in Maryland, \$345,045.24, and in the District of Columbia, \$168,465.14. Differences between these values and the face value of stock transferred are represented solely by arbitrary valuations of the franchises acquired. What these franchises may have consisted of in Maryland does not appear. There was no franchise acquired in the District of Columbia, and all that could be acquired in addition to the tangible property of the vendor company was what may be called the "good will" of an established business.

Since the aforesaid purchases, the defendant has issued and sold 6 per cent. bonds of the face value of \$500,000. The general telephone business has been extended in Baltimore and to many towns in Maryland, as well as to some portions of West Virginia, and these have been connected with each other and the main offices. Considerable extensions and changes have been made in the plant in the District of Columbia. During the years intervening between the dates of purchase aforesaid and the beginning of the fiscal year in 1898, great expenses, including interest on bonds, have been paid, and regular appropriations to sinking fund have been made. Something has been carried to surplus, and average dividends of a little more than $2\frac{1}{2}$ per cent. have been paid on the full amount of the capital stock.

A very great if not insuperable difficulty in arriving at an accurate calculation of the legitimate cost of the service in the District, which is represented by an exceedingly high figure as compared with other telephone exchanges throughout the country, lies in the fact that it is a branch only of the wide extended business of a single owner. On the books, 40 per cent. of the bonds issued is charged against the District plant, and the latter is likewise charged with 40 per cent. of the general expenses of the company, as well as with its proportion of annual interest and sinking fund appropriations.

The evidence does not show that 40 per cent. of the bond

www.wwcc.com sales was actually expended in betterments in the District, nor does it show that 40 per cent. of general expenses is the real and just proportion to be borne by the Washington plant. Baltimore is a considerably larger city than Washington, and has in operation about 25 per cent. more telephones, with toll-line connections with nearby towns and villages.

Then there are local exchanges in Maryland at Cumberland, Hagerstown, Frederick, Westminster, Annapolis, Mt. Washington, Lutherville, and in West Virginia at Martinsburg. Besides, all of these points are connected with each other by toll lines, and each has additional lines to smaller adjacent villages where no exchange is maintained.

Washington is connected with Baltimore and also, it seems, with Alexandria and Waterloo, Va. The general officers of defendant, including superintendents of construction and of inside and outside maintenance, live in Washington, and considerable items of general expenses consist in traveling expenses caused by the wide dispersion of the business under their charge.

Turning now to the annual expenses of the Washington plant, including the foregoing proportion of general expenses, we find that Haskins, the expert accountant who testified for the defendant, estimates them for the six years from 1892 to 1897, inclusive, as averaging \$66.57 per telephone. In estimating annual expenses, as for maintenance and the like, he includes large annual rentals for receivers and transmitters paid to the American Bell Telephone Company, which appears to own a majority of defendant's capital stock under the old contracts of 1883 and confirmations, 40 per cent. of annual interest upon bonds and some miscellaneous interest, and 40 per cent. of annual appropriations to the sinking fund. In addition he charges a great proportion of the cost of additional underground construction and the substitution of improved appliances and so forth, together with all cost of subscribers' connections.

The most of these inclusions as charges to current expenses of maintenance we regard as inadmissible. Whether these may be admissible as between stockholders and corporation is not the question.

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The interests of the public are here involved and a very different question is presented when they are relied upon as a ground for the resistance of the right of public regulation.

It is plain that interest and sinking fund items are not chargeable as expenses, and we understand this is virtually conceded. There is no proof that justifies the payment of the annual rentals to the parent Bell Company. Patents existing when the 1883 contracts were made have necessarily expired, and the evidence shows that instruments of equal efficiency can be purchased in open market for a sum slightly in excess of one year's rental charge. The right to charge certain improvements to maintenance is more doubtful. Probably the cost of connecting new subscribers may be charged to expenses, because when discontinuances are made the connections become valueless. At the same time, as the majority are practically permanent and productive of revenue, some division of charge between construction and maintenance would seem equitable. Whatever is necessary through ordinary wear or accident to keep the plant in good, serviceable condition is properly chargeable to expenses. On the other hand substitutions of improved appliances for others in serviceable order in order to obtain increased efficiency, as well as increase of plant, would seem to be properly chargeable to construction. It appears that the defendant had, some years ago, laid certain cables in the underground conduit after a plan called the "solid system," at an expense of about \$115,000. An objection to this system was that cables could not be drawn out and repaired or substituted, and another, that additional cables could not be added. Underground construction is expensive, and particularly so where asphalt pavement must be removed and relaid.

This old cable was not abandoned because worn out or incapable of working efficiently. It was not torn up, but a new excavation was made alongside, in which sections of terra cotta conduits were laid. These separate conduits would admit cables composed of 50, 100 and 150 wires, as were then manufactured. Expensive manholes were constructed at intervals, so that the lead-covered cables could be drawn

through the conduits as required for construction or repair. The new subways were provided with a considerable amount of extra conduit, so as to permit the growth of the exchange to about double its then number of subscribers.

Under the conditions stated this new subway, with its extra conduits, should have been charged to construction. This we think is in accordance with the doctrine enounced by the Supreme Court of the United States in the only case in which the question seems to have been considered — *U. P. RR. Co. v. United States*, 99 U. S. 402, 420.

The rule, in our opinion, as between corporation and the public, would be the same that seems to apply in the case of the conversion of a horse railway into one operated by cable or underground electric current, or the erection of extra tracks by steam railway companies.

The defendant also claims the right to charge against annual expenses from 10 to 15 per cent. of value of plant on account of depreciation, although this item does not appear in the figures of the expert Haskins.

We cannot agree to this proposition. It is covered by the regular annual charge of maintenance, which includes all repairs and substitutions of defective and worn-out materials in order to maintain efficiency of operation.

It is impracticable from the evidence to say just what reductions may be made for any one of the years given, on account of the cost of the new underground construction.

Averaging it, with considerable uncertainty, and making the other deductions mentioned, the average annual expense per year, for the six years, would be less than \$50 per telephone subscriber, leaving a possible margin for dividends of from 2 to 3 per cent. upon the actual cost of the plant, which is estimated at from \$428,000 to \$450,000.

The expenses varied considerably during the years embraced in the statement, showing a very great excess for 1897 over the average. This has been ascribed largely to extraordinary repairs made that year on account of delay in permission of the public authorities to make improvements. It would seem that considerable part of this, but how much is

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unascertainable from the evidence, is due to the improved conduit system before mentioned. Moreover, the president's report to stockholders, under date of January 31, 1898, shows an increase of 783 poles in the erections for the year.

Coming down to the evidence of expenditures for the first three quarters of the year 1898, Haskins shows total expenses for the whole year,—estimating the coming quarter at the same proportion,—to amount to \$151,371.57, which is less than the expenditures of 1897.

Continuing his system of charging expenses, he estimates the cost for the year per telephone—taking 2,126 as the average number—at, say, \$71.25.

Deducting interest, sinking fund and rentals as not properly chargeable to expenses, the cost per telephone would be about \$53, making expenses exceed income, at the \$50 rate, about \$6,500 for the year.

Appellants contend that this difference would be more than set off by deducting from salary charges the traveling expenses of officers and the unnecessary cost of services in general. They would deduct for the former \$4,106.74, and for the latter \$19,248.31.

This last deduction would embrace the proportion of general salaries charged to the Washington plant, which amounts to \$10,918.40, with a reduction of, say, \$9,000 from local expenses as excessive and unreasonable to that extent.

That there should be some deduction on account of these expenses seems reasonable, but what that deduction should be does not satisfactorily appear from the evidence. Appellee's statement of the expense per telephone of salaries and wages alone is at the rate of \$37.70 per year in the District of Columbia. This is much greater than the total expense per telephone in many other places given in the testimony. For example, Toronto, Canada, with 5,932 stations, estimates expenses at \$25.26 per station; Detroit, Mich., 4,636 stations at \$20.95 per station. Some smaller cities, none of which, save Grand Rapids, Mich., have more telephones than Washington, range from \$12.50 to \$24 per station. Conditions are frequently so different that the expense of operation in one

city does not furnish a safe rule of comparison for others. Conditions in Washington are peculiar in that its streets and avenues are much wider than those of others brought into comparison, and the average distance required to reach subscribers is much greater. Besides, conditions of construction are more onerous in several respects.

At the same time it does not seem reasonable that these conditions are sufficient to account for the great difference in expense shown in the several tables of charges, particularly those of salaries and wages per telephone.

Again, it does not appear what proportion of expense is due to the outside connections. There are also a considerable number of what are called private lines, that do not enter into the general service. What figure these ought to cut in the calculation of expenses does not plainly appear to us.

As the judgment appealed from must be reversed upon the ground first stated, regardless of the fact that the statutory rate might be most unjust, we have not made up a particular statement of all the many items entering into that consideration.

If the case turned upon this point we would have great difficulty in determining from the mass of figures and opinions in evidence what particular rate would cover legitimate expenses and afford any return for the money invested, and would feel a strong inclination to remand the cause for the introduction of additional evidence upon some of the points of difficulty that have been suggested, and with direction for reference to the auditor to find and report all of the necessary facts with all necessary or important computations and estimates.

The most that we now feel called upon to say is that our examination of the evidence does not satisfy us that the necessary effect of the enforcement of the rate will be destructive of defendant's rights of property.

For the reasons given the decree will be reversed, with costs, and the cause remanded for the entry of a decree granting the injunction in conformity with this opinion.

Reversed.

Mr. Chief Justice ALVEY concurs in the judgment.

TUOHY v. HANLON.

EXECUTORS; COSTS INCURRED IN DEFENDING WILL BEFORE PROBATE;
ORPHANS' COURT.

1. The Supreme Court of this District, holding a special term for Orphans' Court business, has the power to allow an executor who has acted in good faith, expenses incurred and paid by him in employing counsel to resist a *caveat* interposed before the will has been admitted to probate, as well as afterwards.
2. While, in a common-law cause, the court cannot reform a judgment and allow costs after the expiration of the term, in the probate court, the fact that the term has expired at which a judgment was rendered upon a verdict after the trial of issues concerning the validity of a will, refusing to admit the will to probate, will not preclude the court from allowing the executor who has unsuccessfully defended the will counsel fees and costs incurred by him, such expenses not being costs necessarily taxable against the unsuccessful party, but being elements of the accounting within the control of the court during the whole period of administration.

No. 1088. Submitted April 8, 1901. Decided May 21, 1901.

HEARING on an appeal by an administrator from an order of the Supreme Court of the District of Columbia holding a special term for Orphans' Court business, allowing a former executor counsel fees and costs incurred by him in unsuccessfully defending a will to which a *caveat* had been filed. *Affirmed.*

The COURT in its opinion stated the case as follows:

This is an appeal from an order of the Supreme Court of the District holding a special term for Orphans' Court business in a case in which the facts appear to be as follows:

One Thomas Tuohy, late of the District of Columbia and now deceased, being possessed of an estate of the value of

about \$7,000, mostly, if not entirely, composed of personal property, executed in the year 1894, a paper-writing purporting to be his last will and testament, with a codicil thereto, whereby he bequeathed \$5 to one of two sons, the present appellant, \$500 to another son, and the residue of his estate to a widowed daughter and her two infant children, of whom one, at the time of the execution of the will, was of the age of about five years, and the other was of the age of about four years. The appellee, Anthony Hanlon, and another person were appointed by the testator as the executors of the will, which was placed by the testator in Hanlon's possession.

The testator died in 1898; and Hanlon, as was his duty under the law, delivered the will to the register of wills. The person, who had been named as co-executor with Hanlon, having removed from this District, renounced the executorship; and Hanlon filed a petition for the probate of the will and for the issue of letters testamentary to himself. Thereupon, before probate was had of the will, the two sons of the deceased filed a *caveat*, upon which issues were framed for trial by the court before a jury. These issues were two in number,—the first, whether at the time of the execution of the paper-writing the deceased, Thomas Tuohy, was of sound and disposing mind and capable of executing a valid deed or contract; the second, whether the execution of the alleged will was procured by the exercise of undue influence on the deceased. No question seems to have been made of the actual execution of the will in due form of law; and we understand such execution to have been admitted by the caveators.

For the trial of these issues the caveators were made plaintiffs, and the appellee, Anthony Hanlon, was made defendant. The mother of the two infant children was appointed their guardian *ad litem* for the purposes of the contest. They were, in fact, the substantial parties in interest; for their mother, it seems, would receive more of her father's estate by distribution under the theory of his intestacy than she would under the will, if it were sustained.

On both issues the jury returned a verdict in favor of the

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caveators, notwithstanding that in the record before us the justice who presided at the trial certifies that there was substantially no testimony to sustain the charge of undue influence, and that the preponderance of the testimony was in favor of testamentary capacity on the part of the deceased. The justice, however, overruled a motion for a new trial made by the caveatee, for the reason, as he stated, and as he certifies in the record, that, while the preponderance of testimony was in favor of the testamentary capacity of the deceased, it was not so strongly so as to assure a different verdict from another jury. Thereupon, on February 9, 1900, an order was made by the court adjudging the alleged will to be invalid, refusing to admit it to probate, denying letters testamentary to the appellee, and directing the issue of letters of administration to the oldest son of the deceased, the appellant here, who forthwith qualified and entered upon the administration of the estate. The appellee Hanlon delivered to him the entire personal estate in his hands without diminution. And it is proper to add, that the presiding justice, in the record before us, certifies that "Hanlon had reasonable and probable grounds for maintaining said paper-writing and codicil as the valid last will and testament of the said deceased, and that he acted in good faith in endeavoring to maintain it as such, and that no undue influence was exercised by him upon the said Thomas Tuohy in order to procure the execution of said paper-writing and codicil."

On May 29, 1900, the appellee filed a petition for the allowance to him out of the estate of costs and expenses incurred by him in the premises; namely, \$500 for counsel fees, \$10 deposited with the register of wills in the first instance as security for the costs of probate and administration, \$34.80 expended as costs for the procurement of witnesses — in all, the sum of \$544.80; and also a balance of fees amounting to \$47.76 charged against the appellee by the register of wills.

Upon this petition, after holding it under consideration for some time, the court, on November 14, 1900, entered an order in favor of the appellee for the allowance of costs and

expenses, as claimed, directing that the administrator should pay these costs and expenses, and adjudging that, when paid, he should have credit for them in his administration account.

From this order the administrator has prosecuted the present appeal.

Mr. Arthur Peter, for the appellant.

Mr. Hugh T. Taggart and *Mr. Joseph J. Waters* for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

There are two assignments of error,— the one general, to the effect that the court below was without authority to allow to the appellee the costs and expenses in question out of the estate of the deceased; and the second, a special assignment to the effect that, under the system of terms of court now prescribed to be had in the probate court branch as in other divisions of the Supreme Court of the District, it was not competent for the court to allow any costs after the lapse of the term at which the order was made which adjudged the will to be invalid. All the costs are involved in this latter assignment, but only the item of counsel fees in the first.

1. That the question of the propriety of the allowance of counsel fees to a person named as executor in a paper-writing purporting to be a will, is not to be determined by his success or failure in the maintenance of that paper-writing as a valid instrument, is settled by the authorities and does not appear to be contested by the appellant. The very same authorities upon which he relies admit and enforce the rule, that an executor, seeking unsuccessfully to maintain the validity of the will which he has propounded, after the issue of letters testamentary to him, is entitled to be allowed for counsel fees in his account, notwithstanding that in the contest the will has been overthrown and held for naught, if he has acted in good faith. *Compton v. Barnes*, 4 Gill, 55; *Townshend v. Brooke*, 9 Gill, 90; *Glass v. Ramsay*, 9 Gill, 456; *Dorsey v.*

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Dorsey, 10 Md. 471; *Brown v. Johns*, 62 Md. 333. Such has been the ruling of the courts of the State from which we have derived our probate law, and specifically the statutory provisions under which such allowances have been claimed and authorized. And as this ruling is not contested, but on the contrary relied upon by the appellant in support of his contention, it may be accepted as settled law.

The subject-matter was regulated by two sections of the act of Maryland of 1798, Ch. 101, which is the basis of all our testamentary law, and which is substantially in force to this day in the District of Columbia. Subchapter 15, section 17, of that act provides that, upon the trial and determination of any issues, "the Orphans' Court may award costs to the party in their opinion entitled thereto;" and subchapter 10, section 2, provides that an executor or administrator may in his account have an "allowance for costs and for extraordinary expenses, not personal, which the court may think proper to allow, laid out in the recovery or security of any part of the estate."

Under one or other, or both of these sections, the Court of Appeals of Maryland has found the authority for the allowance of counsel fees in the cases cited in which they have been allowed, notwithstanding the contention there, as well as here, urged that the Orphans' Court, being a court of limited and special statutory jurisdiction, to use the express words of the statute itself, "shall not, under pretext of incidental power, or constructive authority, exercise any jurisdiction whatever, not expressly given by this act, or some other law,"—a contention which certainly has lost much of its force since the transfer of the powers of our Orphans' Court to the Supreme Court of the District of Columbia, and especially in view of the recent act of Congress of June 8, 1898, 30 Stat. 434, which seems to constitute the special term of that court exercising the jurisdiction of an Orphans' Court, a court of general jurisdiction. In any event, it is undoubtedly the law that the special term of the Supreme Court of the District exercising the functions of an Orphans' Court is entitled, within the scope of those functions, to proceed in accordance with

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equitable principles and procedure. *Sinnott v. Kenaday*, 179 U. S. 606, 615. Especially in the matter of the awarding of costs is there equitable jurisdiction conferred on the Orphans' Court, and on the Supreme Court of the District of Columbia exercising the functions of an Orphans' Court, by the express terms of the sections of the statute which have been cited.

In the case of *Johns v. Hodges*, 60 Md. 215, it was said that "the awarding of costs in a trial of issues from the Orphans' Court is for that court exclusively: the court of law, in which the issues are tried, has no power to enter a judgment for costs on a verdict of a jury." In the case of *Browne v. Browne*, 22 Md. 103, it was held that the Orphans' Court is the only proper tribunal to determine the question of costs in the case of issues tried before a jury. And in the case of *Levy v. Levy*, 28 Md. 25, in construing a section of the Code of Maryland, which is substantially no more than a re-enactment of the 17th section of subchapter 15 of the act of 1798, already mentioned, the Court of Appeals of Maryland held, that by it the Orphans' Court was "vested with discretionary power to award costs and to enforce their payment." So, also, in the case of *Brown v. Johns*, 62 Md. 333, it was held that "the Orphans' Court, in a case of issues sent to a court of law for trial, has discretionary and exclusive power in the matter of awarding costs, and its judgment is final, and no appeal lies therefrom."

But the contention here is that counsel fees are not costs in the legal sense of the term "*costs*," and therefore cannot be allowed at all to either party in any event or in any case under subchapter 15, section 17, of the act of 1798; and that, if allowed as "extraordinary expenses," under subchapter 10, section 2, of that act, it can only be to an executor, defending a will after the issue of letters testamentary to him; and not to a person named as executor to whom letters testamentary have not been granted. And it is argued in support of the contention that an executor, equally with an administrator, derives his powers, not from the will of the deceased whereby he has been appointed, but from the

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court which issues his letters testamentary to him whereby he is authorized to act.

We cannot subscribe to the theory that in this District, whatever the doctrine may be elsewhere, an executor derives his authority from the probate court, and not from the will of the deceased person. On the contrary, we have distinctly held, in accordance with precedent, and with that which we may regard as the common law of England on the subject, that an executor, differing radically in this regard from an administrator, derives his authority from the will, and not from the court wherein he becomes qualified to act. *Sinnott v. Kenaday*, 14 App. D. C. 1; 2 Blackstone's Commentaries, 507. And that ruling has been affirmed by the Supreme Court of the United States on appeal. *Kenaday v. Sinnott*, 179 U. S. 615. So, it must be regarded as settled law with us that an executor, although held as a trustee for all the purposes of the law and required to administer that trust under the direction and authority of the tribunal specifically provided for the purpose, derives his interest in the estate of the deceased entirely from the will, and becomes vested with that interest from the moment of the testator's death. He may do many things which an administrator is not entitled to do; as, for example, to bury the deceased in a manner suitable to the estate which has been left. In fact, the great commentator on English law, at the place above cited, 2 Com. 507, says that he can do most of the things before the probate of the will which he may do afterwards. Indeed, in the present case it appears that he had actually reduced the personal estate of the deceased into his own possession; for in the record it is stated that, after the overthrow of the will and the appointment of the appellant as administrator, he delivered to this latter "the entire personal estate of the deceased then in his hands, without diminution." He seems, therefore, to have already entered upon the performance of the duties of an executor.

Of course, a person named in a will as executor is under no obligation to accept the trust reposed in him by the testator. He may renounce the executorship, and thereby relieve him-

self from all duty and from all liability connected with it. But, as in the case of every other trust, if he accepts it, he must proceed with the execution of it, and he cannot be relieved from so doing, except by the order or decree of a court of competent jurisdiction. The executor named in the present case accepted in good faith the trust confided to him by his testator, when he filed his petition for the probate of the will and the issue to him of letters testamentary. He had no reason to suppose that the will was not a good and valid will; and he was within the line of his duty, as he certainly was within the line of his right, to proceed with the application. Possibly after the filing of that petition, and after the coming in of the *caveat*, he might even then have withdrawn,—although there is very grave doubt whether he could at that time have done so without the permission of the court. For his acceptance of the trust does not date from the issue of letters testamentary to him, if they are issued, but from the time of filing his petition. The petition is the solemn declaration of his acceptance; and it may be questioned whether he can, of his own accord, and without the permission of the court, turn back after he has filed his petition. Nor is it apparent how any good purpose could be subserved, if he then turned back. The will is then in court; it has been propounded for probate; it must be disposed of in some way before any letters of administration are granted to anyone. The withdrawal of the executor named could only result in the appointment of some one else to conduct the contest. In the present case, where infant children, and they alone, are the real parties interested in sustaining the will, it would be a disgrace to our jurisprudence if their rights could be overthrown by the withdrawal of an executor from an impending contest. As was said in the case of *Compton v. Barnes*, 4 Gill, 55, already cited, it appears to us that “under such circumstances it was the plain and imperative duty of the executor to appear to the *caveat*, for the purpose of resisting it and vindicating the will.”

In the case of *Townshend v. Brooke*, 9 Gill, 90, which certainly seems to sustain the appellant's contention, and in

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which it was held that "the Orphans' Court has no authority to direct a collector *pendente lite* to pay a sum of money to persons named as executors in a will, to be appropriated as fees to counsel employed to resist a *caveat* interposed before a will was admitted to probate," there were circumstances which must be held to differentiate it from the case now before us. Under the practice as it obtained in Maryland at and before the time at which that case was decided, and under the former practice in this District, when proceedings for the probate of wills and the issue of letters testamentary thereon were all *ex parte* and of the most informal character, the acceptance of his trust by the executor and the issue of letters testamentary to him were simultaneous. The issue of the letters was the first evidence of the acceptance of the trust. But it was the acceptance of the trust and not the mere issue of the letters that imposed upon the executor the duty of defending the trust. At that time, too, it might well be, and it often was the fact, that parties in interest had no notice of the existence of a will until after the issue of letters testamentary. In the present practice, however, of the Supreme Court of this District holding a special term for Orphans' Court business, the situation is very greatly changed. By the rules of that court it is prescribed that an executor, desiring to propound a will for probate and to procure letters testamentary thereon, must file a petition to that effect under oath, give the names and places of residence and the relationship of those interested, and serve notice upon them of his purpose. And the recent act of Congress of June 8, 1898 (30 Stat. 434), adopts and enlarges this practice. By the provisions of this practice and of the act of Congress cited, it is a matter of necessity that, in the great majority of cases, *caveats* must be filed and issues must be formulated and tried before the probate of a will and not afterwards. And it necessarily follows, too, that, for the purpose of the determination of the validity of a will, the acceptance of his trust by the executor and his duty to maintain the will must be held to date from the time of the filing of the petition.

This being so, the decision in the case of *Townshend v.*

Brooke, is no longer pertinent, even if its authority was not to some extent shaken by the subsequent case of *Brown v. Johns*, also heretofore cited; and the principle of the decision in the case of *Compton v. Barnes, supra*, becomes applicable. The allowance of counsel fees in the present case is, as in the case of *Brown v. Johns*, to an executor who has entered upon the performance of his trust and who has in good faith defended that trust against the attack upon it.

If it be urged, as indeed it has been urged, and as was urged in the case of *Brown v. Johns*, and in the English case there referred to of *Charter v. Charter*, L. R. 7 H. L. 364, and same case, 24 W. R. 874, the allowances of charges like this might endanger the rights of next of kin or heirs-at-law, it must be remembered that the matter of costs and expenses is in the discretion of the probate court, and that the trust reposed in that court by the law is not likely to be abused. What the next of kin are entitled to in the distribution of an estate is not the whole estate left by the deceased, but that estate as shown to exist after the allowance of the reasonable costs of administration. It is not so much the case of money claimed by one person to be payable to him by another and denied by that other to be due, as the case of a fund in court to be taken care of and to be administered for the benefit of the person or persons, not in the first instance absolutely known, but who may ultimately be found to be entitled. The reasonable cost of such administration, and only such cost as is reasonable, is to be allowed out of the fund.

We think that the court below in this case acted within the authority conferred upon it by law; and that, as it so acted, the amount of the allowance was discretionary with it. And we do not understand that there is any claim that the allowance was excessive, or that there was any abuse of the discretion reposed in the court by law.

2. But it is contended, in the second place, that, even if the court below did have the general authority in this case to allow counsel fees and costs, it was without authority to do so after the lapse of the term at which the order was made which confirmed the verdict of the jury upon the issues. This

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contention is based upon the provisions of the act of Congress of June 8, 1898, already referred to and the rules made by the court below in pursuance of that act.

The act of Congress of June 8, 1898, as is well known, was intended to remedy certain anomalies or deficiencies in previous legislation resulting in great measure from the abolition of the old Orphans' Court and the transfer of its jurisdiction to the Supreme Court of the District. Under previously existing law, the Supreme Court of the District, exercising the functions of an Orphans' Court, could not take the probate of wills of real estate, and had no jurisdiction, or only an exceedingly limited jurisdiction over real estate of a deceased person; and the issues, which it was authorized to formulate and to transmit for trial to the common-law branch of the court, could only affect personal property. The decision of those issues was in no manner binding upon the heirs-at-law, as distinguished from the next of kin, even when the heirs-at-law were in fact the same persons as the next of kin. Nor was there any means provided for the determination of the validity of wills of real estate in advance of an attack made upon them by those claiming adversely through an action of ejectment. Moreover, the transmission of issues for trial to the common-law branch of the court, which was eminently right and proper, when the Orphans' Court existed as formerly constituted, was felt to be a useless circuitry when those issues could just as well be tried in the branch of the court which formulated them, and a jury could equally well be summoned into that court. The purpose of the act of 1898 was to remove these anomalies and deficiencies, to give to the probate court authority to take the probate of wills of realty as well as of personalty, to administer the realty as well as the personalty so far as might be necessary for the payment of debts and legacies, to provide for the formulation of issues to involve the realty as well as the personalty and for the trial of those issues before a jury summoned in the probate court itself, and to give to the judgment, order, or decree of the court rendered upon the verdict of the jury the conclusiveness and binding effect of finality.

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The provision of the act in this last regard is in the following terms:

"In all cases in which such issues shall be tried the verdict of the jury and the judgment of the court thereon shall, subject to proceeding in error and to such review as the common law provides, be *res judicata* as to all persons, nor shall the validity of any such judgment be impeached or examined collaterally."

The act further provided that the Supreme Court of the District in general term might make rules of practice necessary for the exercise of the jurisdiction thus conferred. And that court accordingly made rules, of which two are cited as applicable to the present controversy. Rule 1 of these is in the following terms:

"The terms of this court holding a special term for orphans' court business shall be held as follows: First Monday of January, first Monday of April, first Monday of October."

And the second, which is designated as Rule 12, prescribes that —

"All proceedings (in the orphans' court branch) relating to the determination of issues of fact shall conform as nearly as practicable to proceedings in the special term holding a circuit court for the trial of issues of fact therein, and all rules of this court applicable to such proceedings in the circuit court shall apply, unless contrary to the law governing this branch of the court and these rules."

The trial of the issues formulated in the present case and the verdict of the jury thereon were had at the October term of 1899; but the cause was carried over to the January term of 1900 by the interposition of a motion for a new trial, which was not disposed of until January of the last-mentioned year. The order entered by the court upon the verdict of the jury, the purport of which has already been stated, was made on February 9, 1900, during the pendency of the January term. That order is wholly silent as to costs and expenses. The question of the allowance of costs and

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counsel fees, so far as the record shows, was first raised by a petition for such allowance presented to the court on or about June 1, 1900, while the April term was pending; and the order for the allowance, which has given occasion for the present appeal, was made on November 14, 1900, when the October term had commenced and was pending. The contention of the appellant is, that this question of costs should have been raised and disposed of by the order of February 9, 1900; that the omission of costs and allowances from that order was the equivalent of a refusal to allow them to either party; and, therefore, that the matter was *res judicata* after the lapse of the term at which that order was entered.

To the correctness of this contention we cannot accede. We must assume that the rules adopted by the Supreme Court of the District to give effect to the act of Congress were not intended to contravene or nullify any previously existing law. Indeed, the second rule cited expressly provides that they shall not apply in any case contrary to existing law. Now, in view of the provisions of that law, it would scarcely be competent for the court to break up into terms the year of administration allowed for the settlement of estates, or to require that accounting should be had or claims presented and adjudicated with reference to any such terms. Undoubtedly, these terms were prescribed merely for the purpose of giving due effect to that clause of the act of 1898 which provides that judgments pronounced by the probate court upon the verdicts of juries rendered upon issues involving the validity of wills, should have the same finality as judgments at common law. And we know that at common law the device of terms, apart from their convenience in the dispatch of business, is mainly intended to determine the time from which the element of finality shall absolutely inhere in judgments there rendered.

At common law costs are a necessary incident of judgment; they must be allowed at the time of rendition of judgment, or within the term during which that judgment remains under the control of the court, if they are allowed at all. After the lapse of the term, the judgment itself

passes from the control of the court; and necessarily, if the matter of costs has been overlooked or neglected, it is not competent for the court to reform the judgment or to allow costs. But in the probate court the allowance of costs or of costs and expenses, is not, and never has been, an incident of the order of the court made upon the verdict of the jury after the trial of issues concerning the validity of the will. We are not advised of any practice, and there is no requirement of law, that demands the settlement of costs at the time the order is made upon the verdict. There would be plausibility in the appellant's contention, if the costs to be allowed or charged were assessable individually for or against the parties to the issues; for it may be assumed that they finally go out of court with the rendition of the judgment or order and the lapse of the term wherein it has been rendered. But the costs and expenses chargeable in the probate court and allowable under the act of 1798 are costs of administration, payable, if at all, out of the estate in court. They enter into the accounting, and do not necessarily in all cases concern the parties to the issues. And inasmuch as they are elements of the accounting and concern the administration of the estate, their allowance or disallowance is not limited by terms prescribed for an entirely different purpose, but is within the control of the court during the whole period of administration.

From the record before us, it appears that the appellee, as executor named in the will of the deceased, not only accepted the trust by filing his petition for the probate of the will and the issue of letters testamentary to him, but also had actually entered upon the performance of the trust and had taken the estate into his possession; for it is certified that, upon the determination of the invalidity of the will, he forthwith delivered the whole estate in his hands, without diminution, to the appellant as administrator. Whether he filed any account at that time does not appear; and we may assume that he did not. But an accounting at that time would have been proper, and his costs and expenses reasonably incurred in the administration to that time could then

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have been adjudicated. He adopted the course, which was probably better and more orderly, of turning over the entire estate to the administrator and then presenting his claim for the allowance of his costs and expenses. It does not appear to us that he was precluded from doing this, or that the court had lost jurisdiction of the subject-matter, by the fact that terms of court had been provided for the determination of issues on the validity of wills.

It is our conclusion that the court below was warranted by law in making the order appealed from, and that the order should be *affirmed, with costs. And it is so ordered.*

THE UNITED STATES EX REL. BROWN

v.

ROOT.

MANDAMUS; ARMY OFFICERS, DISMISSAL OF, DURING TIME OF WAR.

Where an officer of the army during the war with Spain, after having been acquitted by a court-martial of charges preferred against him, was, by direction of his commanding general, retried by the court-martial on the same charges, and was convicted and dismissed from the service, and thereafter, peace having been declared, and its term of enlistment having expired, his regiment was mustered out and discharged, it was *held* that *mandamus* would not lie on his relation against the Secretary of War to compel the respondent to cause the relator to be mustered out and discharged.

No. 1040. Submitted April 4, 1901. Decided May 21, 1901.

HEARING on an appeal by the relator from a judgment of the Supreme Court of the District of Columbia dismissing a petition for the writ of *mandamus*. *Affirmed.*

The COURT in its opinion stated the case as follows:

This appeal is from a judgment of the Supreme Court of the District dismissing a petition for a writ of *mandamus*.

The relator, Lewis E. Brown, received a commission on July 7, 1898, as first lieutenant of the ninth regiment of volunteer infantry in the service of the United States. He was brought to trial before a court-martial, convened at San Luis, Cuba, by order of Brigadier-General Wood, commanding the department of Santiago. The charge was conduct unbecoming an officer and a gentleman, with specification that he did gamble with enlisted men of said regiment in camp near San Luis about October 11, 1898.

The court-martial found the relator not guilty of charge and specification, and reported the proceedings in due order to the commanding general, and adjourned *sine die* as the record shows.

The first indorsement upon the record is that of Capt. H. K. Baily, fifth infantry, and acting judge advocate of the department of Santiago, under date December 1, 1898, to the effect that the evidence reported is conclusive of guilt and the proceedings should be returned for re-consideration of the finding. A further indorsement shows that return was made for reconsideration by the court-martial by order of Brigadier-General Wood. December 6, 1898, the court reconvened, and having reconsidered the case found the relator guilty of charge and specification, and sentenced him to be dismissed from the service.

This sentence was approved by General Wood December 24, 1898, and forwarded to the President for his action. It was returned to General Wood inviting his attention to the 106th article of war, which, in time of war, removes the ordinary requirement of approval by the President of sentences of the kind. On February 15, 1899, General Wood ordered the sentence to take effect on February 17, 1899.

The regiment to which relator had belonged was regularly mustered out and discharged from the service of the United States at Camp Meade, Pennsylvania, on May 25, 1899, peace with Spain having been declared. Relator, claiming that having been once acquitted by judgment of the court-martial, the subsequent reconsideration by order of General Wood, and conviction thereon, was without authority and

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void, avers that it was the duty of the Secretary of War to muster relator out of the service, and that through failure of such duty he is unable to obtain pay for the services rendered by him under his appointment and has sustained damage.

On May 7, 1900, relator addressed a communication to the respondent — Elihu Root, Secretary of War — asserting the nullity of the sentence dismissing him from the service, and asking for an honorable discharge as of the date, May 25, 1899, when his regiment had been mustered out.

This application was refused on the ground of relator's conviction and dismissal aforesaid.

The prayer is that the writ be issued commanding the respondent "to cause relator to be mustered out and discharged from the volunteer service of the United States notwithstanding said alleged sentence."

Mr. Lorenzo Bailey and *Messrs. Dudley & Michener* for the appellant.

Mr. T. H. Anderson, United States Attorney for the District of Columbia, and *Mr. Ashley M. Gould*, Assistant United States Attorney, for the appellee.

Mr. Justice SHEPARD delivered the opinion of the Court:

Without regard to any question of irregularity in the proceedings of the court-martial, subsequent to the judgment of acquittal rendered and reported, or of the invalidity of the conviction and sentence thereafter for the same offense, the judgment dismissing the relator's petition must be affirmed.

Any one of the following grounds are, in our opinion, sufficient:

1. The President of the United States is the commander-in-chief of the army. By his authority Brigadier-General Wood was in command of the department of Santiago, Cuba. The war with Spain had not ended when the conviction and dismissal of relator from the service occurred.

Whether, notwithstanding the final action of the court-martial and of the general in immediate command, the relator was entitled to be treated as still in the service and to be mustered out with his regiment and honorably discharged at the close of the war, was a question for the President to determine, in accordance with his duty. The Secretary of War, no matter what powers he may in fact exercise in such matters, is the representative and agent of the President, whose will is executed. As was said of the duties of the Secretary of State, under analogous circumstances, in *Marbury v. Madison*: "He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts." 1 Cr. 137, 167.

2. Whether justly or unjustly, the relator was actually dismissed from the army of the United States, in time of war, by the order of the general in immediate command of the army in the department of Santiago, whose official action in such cases must be regarded as that of the President until disapproved and set aside by him. Independently, therefore, of the proceedings of the court-martial, the relator's dismissal from the service was within the powers of the President; for it is well settled that, in time of war, the President has the authority, under the Constitution and laws, to dismiss an officer of the army and navy from the service for any cause which, in his judgment, either renders the officer unsuitable for, or whose dismissal would promote, the public service. *Blake v. United States*, 103 U. S. 227, 235; *Mullan v. United States*, 140 U. S. 240, 245; *Quackenbush v. United States*, 177 U. S. 20, 25. For reasons heretofore given, the grounds of the exercise of this authority, by the President, are not matters of judicial inquiry. As was said in *Quackenbush v. United States*, *supra*: "When through mistake, or misapprehension, or for any other reason, injustice has been done, Congress has the power to accord relief; but the courts cannot of their own motion review the grounds of action taken in the constitutional exercise of executive power."

3. Assuming that the relator's conviction, after the first

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judgment of acquittal, was beyond the power of the court-martial, and that his dismissal from the army in the execution of the sentence was likewise unauthorized, yet there seems to be no substantial right of person or property in controversy under the allegations of his petition and his prayer for judgment. He has neither been restrained of his liberty nor deprived of any right of property over which the court has jurisdiction. He has been dismissed from the army; but the special term of service for which his regiment was enlisted and he and his fellow officers were commissioned has expired, it seems, by operation of law, or by executive authority under the law. His prayer is that he be honorably discharged as of the date upon which he could have been discharged, along with the others, had he then been recognized as being in the service under his former commission.

As has been said by the Supreme Court of the United States in enunciating the governing principle: "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *California v. San Pablo, etc., RR. Co.*, 149 U. S. 308, 314; *Donaldson v. Wright*, 7 App. D. C. 45, 63.

It is true, relator charges as a grievance that he has been unable to obtain pay for his services because of his unauthorized dismissal. This is upon the assumption necessarily, that not having been lawfully dismissed the service, his salary continued to run until his regiment was actually mustered out. But this court could not take jurisdiction of an action either to compel the payment of his salary or to ascertain the validity of his claim thereto. The United States cannot be sued save by their own consent and then only in the par-

ticular court that they may designate for the purpose. Recognizing this familiar principle, no such relief has been asked.

All that could be accomplished by a judgment in relator's favor, as prayed for, would be the expression of an opinion that his dismissal from the service, in disgrace, was not within the power of his commanding general at the time. Such a judgment, compelling a certificate of honorable discharge, might, as claimed, have the effect of vindicating the character of the relator.

But courts do not sit for the vindication of character save to the extent that the same may be involved in, or incidental to the enforcement of some remedy for the protection or vindication of rights of person or property.

The United States Court of Claims would, probably, have jurisdiction of an action by the relator to establish the validity of his claim to salary accruing after the date of his dismissal.

The maintenance of such an action would necessarily involve the decision of the single question sought to be adjudicated here.

Assuming that such jurisdiction exists would furnish another reason for refusal of relief by way of *mandamus*, for that writ lies only in plain cases and where there is no other legal remedy.

Without intimating any opinion in respect of the validity of the proceeding of the court-martial, and for the reasons given above, the judgment appealed from will be affirmed with costs. It is so ordered.

Affirmed.

SANBORN v. MAXWELL.

EQUITABLE ASSIGNMENTS; ARBITRATION AND AWARD; CREDITOR'S BILL;
ASSIGNMENTS OF CLAIMS AGAINST THE UNITED STATES.

1. An oral agreement to pay attorneys a specific sum as compensation for services to be performed in securing an appropriation from Congress, which sum is to be, to that extent, an interest in the money to be appropriated, will create a charge upon the proceeds of such an appropriation, enforceable as an equitable assignment or lien.
2. Parties holding such a lien, and in favor of whom an award of a specific sum of money has also been made in proceedings under an agreement to arbitrate, may maintain a creditor's bill in equity upon such award without first reducing their demand to judgment, the award, if regularly made, being as conclusive of the demand, both in respect of its validity and amount, as a judgment would be; or being, at least, sufficient foundation for the enforcement of their equitable lien.
3. Where one of two parties has an equitable lien upon a fund to be realized by the other for services to be performed, and in arbitration proceedings between the parties to determine the amount due for such services, is awarded a sum certain for such services, the lien is not merged in the award, but remains enforceable for the full amount of the sum awarded.
4. There is nothing in section 3477, R. S. U. S., rendering void all transfers and assignments made of any claim upon the United States, or of any part or share thereof or interest therein, unless executed in a certain manner, that will prevent any court of competent jurisdiction as to the subject-matter and parties from making such orders as may be necessary and appropriate to prevent one who has a claim for money against the Government from withdrawing the proceeds of such claim from the reach of his creditors; provided such orders do not interfere with the examination and allowance, or rejection of such claim by the proper officers of the Government, nor in any wise obstruct any action that such officer may legally take under the statutes relating to the allowance or payment of claims against the United States; *following* Manning v. Ellicott, 9 App. D. C. 71, and Marble Co. v. Burgdorf, 13 id. 506.

HEARING ON AN APPEAL (specially allowed) by one of several defendants from an interlocutory order of the Supreme Court of the District of Columbia overruling the demurrer of such defendant to a bill in equity for an injunction, the appointment of a receiver, and the enforcement of an equitable lien upon a fund in the Treasury of the United States claimed by said defendant. *Affirmed.*

The COURT in its opinion stated the case as follows:

This case comes before us on a special appeal allowed from a decree overruling a demurrer to the complainants' bill.

The bill was filed by Charles A. Maxwell and George S. Chase as partners against John B. Sanborn and Charles King, who were sued as former partners. Complainants are attorneys, resident in the District of Columbia, where King, who is an attorney, also resides. Sanborn resides in the State of Minnesota. Ellis H. Roberts, as Treasurer of the United States, was made a party defendant by amended bill. The substantial charges of the bill are: In the year 1889, Sanborn had a contract with certain bands of Sioux Indians to collect from the United States certain forfeited annuities under a former treaty with said Indians. In 1889, the United States negotiated a treaty with the Indians which, among other things, provided for the restoration of the annuities, which was sent to Congress for ratification in December, 1890. In December, 1890, Sanborn, who was an attorney himself, verbally retained complainants to perform certain services in connection with the preparation of the cases of the Indians for presentation before the appropriate committees of Congress, and to appear before them for Sanborn on account of said Indians. "It was agreed between said defendant, Sanborn, and these complainants that the latter should receive the sum of \$5,000 as compensation for their services, which said sum was to be, to that extent, an interest in the said fees of the said defendant, Sanborn." Said services were continuous and laborious, and contributed to the settlement of the said Indians' claims. A part of the

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fees due Sanborn, namely, \$13,000, was paid over to him, and the remainder was postponed on account of certain questions concerning the expiration of his contracts. Sanborn, on account of this postponement, refused to pay complainants until the balance claimed by him should be allowed and paid, and removed the sum collected to Minnesota. Complainants then assisted Sanborn in the prosecution of his postponed claims, and the same were allowed by Congress in March, 1899, which directed the payment to Sanborn of the balance due him, namely, \$41,702.21, all of which, excepting about \$3,880, was collected by Sanborn in March, 1899. Sanborn again refused to pay complainants and removed the money as before.

Upon request of Sanborn, an agreement for arbitration was executed by the parties on May 17, 1899. The arbitrators agreed upon, met, heard the dispute and made an award in writing to the effect that Sanborn should pay the complainants the sum of \$3,300.

The award was accepted by the parties, and on July 6, 1899, Sanborn paid complainants the sum of \$1,500, which they allow as a credit on the same, but has failed and refused to pay the balance due, namely, \$1,800, with interest. There remain due to Sanborn the sum of \$1,840 due in 1899, and \$1,840 due in 1900, which complainants fear he will collect and remove from the jurisdiction, if not restrained. By reason of the facts alleged and the former misapplication of funds by Sanborn, he has shown himself an improper person to receive the money belonging jointly to him and complainants.

The allegations against King are that he was a partner with Sanborn in the contracts, though the same were in Sanborn's name alone, and he is joined on that account, and called upon to answer, though not under oath.

The prayers of the bill are, that Sanborn and King be enjoined from receiving any money from the Treasury on account of said sums due, that the Treasurer be restrained from paying the same, that a receiver be appointed to collect and hold the fund, and for the payment to complainants there-

from ~~the balance due on~~ the said award. The injunction was granted and a receiver appointed, who has collected the sum of \$3,680, due Sanborn, and holds the same subject to the order of the court.

King answered the bill; but the matters of his defense are not involved on this appeal. Sanborn entered a demurrer, which, having been overruled, he was granted leave to take this appeal from the order.

Mr. Henry E. Davis and Mr. Charles Cowles Tucker for the appellant:

1. The mere fact that the debtor is a nonresident and is about to remove assets from this jurisdiction, will not entitle a simple contract creditor to maintain his bill in equity without first reducing his claim to judgment. The extent to which this rule has been modified is this, that, as the law will not compel a party to do a useless thing, if the debtor is a nonresident and is also insolvent, so that he has no assets *anywhere* out of which the claim of his creditors may be satisfied, he, the creditor, cannot be said to have an adequate remedy at law, and he will not be required to reduce his claim to judgment and to issue and secure a return of execution, before resorting to a court of equity for relief. *Hess v. Horton*, 2 App. D. C. 81; *Hardware Company v. Driggs*, 13 App. D. C. 272; *Smith v. Railroad Company*, 99 U. S. 401; *Bethell v. Wilson*, 1 Dev. & B. Eq. (N. C.) 610; *Jones v. Green*, 1 Wall. 330. In the case at bar, there is no charge of insolvency against the defendants, or either of them, and no intimation that the complainants could not collect a judgment if they obtained one.

2. While, in the body of the bill, the complainants claim to be the equitable *owners* of a certain portion of the fund in question, by reason of an equitable assignment from Sanborn, their claim in the submission is for a sum certain "*for services rendered by them*," and the award is for the payment by Sanborn to them of a *definite sum*. In other words, before the filing of the bill, they claimed that the relation of debtor

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and creditor alone existed between themselves and Sanborn, while now, although still endeavoring to enforce the award, they say that Sanborn is endeavoring to keep from them that of which they are the owners. It is submitted that the allegation in the body of the bill of an equitable assignment is "a mere pretense to give jurisdiction" and is only "a colorable disguise for the purpose of changing the forum of litigation," in the words of Judge Story (Eq. Jur., Sec. 74); and that the ruling of this court in *Hess v. Horton*, 2 App. D. C. p. 81, is specially applicable here, namely, that the rule that equity has no jurisdiction where plain and adequate remedy can be had at law, is necessarily most closely adhered to in Federal courts, in view of the constitutional provision establishing the distinction between law and equity and preserving the right of trial by jury. See *Hipp v. Babin*, 19 How. 271; *Grand Chute v. Winegar*, 15 Wall. 373; *Pechstein v. Smith*, 14 App. D. C. 27. There can be no doubt that the appellees have an adequate remedy at law, by an action to enforce the award. It is not alleged, as has already been seen, that the appellant is insolvent, or not able to respond to any judgment. But the appellees seek, indirectly, to enforce the award. We submit this cannot be done in equity. Equity will not interpose to enforce specific performance where there is an adequate remedy at law, as, for example, when the award simply directs the payment of a sum of money. Morse on Arbitration and Award, p. 60 *et seq.*; Bac. Abr. "Arbitrament," etc.; *Thompson v. Noel*, 1 Atk. 62; *Hall v. Hardy*, 3 P. Wms. 187. For mode of enforcing an award, see Cox Common Law Practice, p. 277.

3. Whatever may have been the contract between the appellee and Sanborn prior to the submission, the award effected a merger of the original cause of action, and their action must now be upon the award and not upon the original cause of action, which, the bill attempts to make out, was upon an assignment by which they acquired an equitable lien. 2 Am. & Eng. Encyc. (2d ed.) 798-9. See also *Kendall v. Stokes*, 3 How. 97.

4. There is nothing in the contract, even as complainants

allege it, which gives to them an equitable lien upon the fund in question. Their right to such a lien depends upon whether it can be said that Sanborn made them an equitable assignment of an interest in the fund. We submit that, upon their own showing, he did not. As to what constitutes an equitable assignment, see *Christmas v. Russell*, 14 Wall. 69. See also *Trist v. Child*, 21 Wall. 447; *Wright v. Ellison*, 1 Wall. 16; *Pugh v. Porter*, 112 U. S. 737; *Porter v. White*, 127 U. S. 235; *Woods v. Dickinson*, 18 D. C. 307; *Lamon v. McKee*, 18 D. C. 460-1; *Dillon v. Barnard*, 21 Wall. 439; 2 Am. & Eng. Encyc. (2d ed.) 1068, and cases cited.

5. It may be sought to sustain the jurisdiction of the court upon the theory that the fund, being in the Treasury of the United States, is subject to the jurisdiction of the court, irrespective of the residence of the parties. This involves, of course, the question whether the complainants can proceed in equity as simple contract creditors, and, if not, whether they have a lien upon the fund. These questions, we have endeavored to show, must be answered in the negative. But it should also be observed that a claim against the United States is not legally situated in the District of Columbia, but is payable anywhere in the United States, and in *Price v. Forrest*, 173 U. S. 410, which will be relied upon by appellees, the receiver was appointed at the instance of a judgment creditor in New Jersey. See *Wyman v. Halstead*, 109 U. S. 654; *In re Coit*, 3 App. D. C. 246; *King v. United States*, 27 C. Cls. 529; *Rutherford v. United States*, 27 C. Cls. 539.

6. If the court should be of opinion that, by the terms of the alleged contract between Sanborn and the appellees, he, at least in equity, assigned to them an interest in his contracts with the Indians, or in the fees he was to collect thereunder, it is clear that such assignment was void under Sec. 2106, R. S. U. S., read in connection with Sec. 2103. Sanborn's contracts were with "certain Sioux Indians belonging to the Sisseton and Wahpeton and Medawankanton and Wahpekootah bands," and referred to certain annuities which

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they claimed of the United States. Sanborn's alleged assignment to the appellees was verbal and, therefore, clearly within the inhibition of section 2106.

7. Section 3477 renders void all transfers and assignments made of any claim upon the United States or of any part or share thereof or interest therein, unless executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. If it be contended that the assignment by Sanborn was not of a claim against the United States, but of a claim against the Indians, we direct attention to the fact that Sanborn's fees were payable directly to him by the United States, government drafts or warrants being issued to him and in his name. See also act of Congress of March 3, 1899, Sec. 2 (30 Stat. 946). He did not collect his money from the Indians, but from the United States.

The act of February 26, 1853 (now R. S. U. S., Sec. 3477), renders all claims against the government inalienable, alike in law and in equity, for every purpose and between all parties. *Spofford v. Kirk*, 97 U. S. 484; *United States v. Gillis*, 95 U. S. 407; *Walker v. Brown*, 165 U. S. 654; *Bell v. Halsell*, 161 U. S. 76.

If this were an action at law by the appellees, as it should be, to recover from the appellant a balance due for their professional services, it could not, perhaps, be successfully contended that section 3477, R. S. U. S., would stand in the way of a recovery. See *Wright v. Tebbitts*, 91 U. S. 253.

8. It will be contended, perhaps, that the averment, on information and belief, that the defendants Sanborn and King were partners, will give the court of equity jurisdiction. But, assuming that Sanborn and King were partners, that does not place the complainants in any better position, or give the court jurisdiction. See 5 Encyc. of Pl. and Pr. 483-485.

9. It will be contended that the amended bill is maintainable as a bill for discovery as to the alleged partnership relations. It is not good as a bill for discovery, first, because

it waives answer under oath, and, secondly, because it fails to charge that the complainants are unable to prove the facts sought to be discovered by other testimony than that of the defendants. See *Weed v. Smull*, 7 Paige, 573; *Brown v. Swann*, 10 Pet. 497; *Plumb v. Bateman*, 2 App. D. C. 170.

Messrs. Douglass & Douglass and Mr. Andrew Y. Bradley for the appellees.

Mr. Justice SHEPARD delivered the opinion of the Court:

As the case may come before us again on appeal from a final decree rendered after answer shall have been made and testimony submitted, our conclusions upon the points raised by the demurrer will be stated briefly.

1. The agreement alleged in the bill, substantially to the effect that complainants' fees for services should be satisfied out of the proceeds of defendant's claim in controversy and constitute an interest therein to that extent, created a charge enforceable as an equitable assignment or lien. *Dexter v. Gordon*, 11 App. D. C. 60, 65, 66; *Hutchinson v. Worthington*, 7 Id. 548; *Fourth St. Bank v. Yardly*, 165 U. S. 634, 644; *Walker v. Brown*, 165 U. S. 654.

2. The question, whether complainants can maintain a bill as simple contract creditors, without first reducing their demand to judgment and obtaining ineffectual execution thereon, is immaterial. The reasons for the general rule requiring that foundation for an ordinary creditor's bill do not apply, and hence it is not necessary to consider whether such a bill could be maintained under some of the exceptions to that rule recognized in the following cases: *Hardware Co. v. Driggs*, 13 App. D. C. 272; *Droop v. Ridenour*, 9 App. D. C. 95. The complainants' demand has been liquidated by the award which is the foundation of their bill. This award, regularly made and apparently unimpeachable, is as conclusive of the demand, both in respect of its validity and amount, as the judgment of a court of competent jurisdiction would be. 2 A. & E. Encyc. Law, 794. It is, at

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least, sufficient foundation for the enforcement of the equitable lien, heretofore recognized, upon the fund within the jurisdiction of the court.

3. The contention of the appellant, that the equitable lien has been lost because not recognized and included in the award, is without merit. The agreement for arbitration shows that nothing was submitted but the question whether Sanborn was indebted to the complainants, and if so, in what amount. There is nothing in the agreement or the award to indicate that a finding in respect of the lien now claimed was in contemplation. The lien was, therefore, not merged and remains capable of enforcement to the full amount of the sum awarded, upon the same principle that a mortgage lien remains unimpaired after the conversion of the debt which it secures into a judgment at law.

4. The defense, that the agreement constituting the equitable lien or assignment was prohibited by the terms of Sec. 3477, R. S. U. S., is not available to the appellant in this suit.

The United States have no interest in this proceeding, whatever, and it is unnecessary to consider the effect of the statute were the lien or assignment asserted against them. *Price v. Forrest*, 173 U. S. 410, 423. In that case, Mr. Justice Harlan, speaking for the court, said: "As this court has said, the object of Congress by section 3477 was to protect the Government, and not the claimant, and to prevent frauds upon the Treasury." *Bailey v. U. S.*, 109 U. S. 432; *Hobbs v. McLean*, 117 U. S. 567; *Freedman's Savings Co. v. Shepherd*, 127 U. S. 494, 506.

There was no purpose to aid those who had claims for money against the United States in disregarding the just demands of their creditors. We perceive nothing in the words or object of the statute that prevents any court of competent jurisdiction as to subject-matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the Government from withdrawing the proceeds of such claim from the reach of his creditors; provided such orders do not interfere with the

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examination and allowance or rejection of such claim by the proper officers of the Government, nor in any wise obstruct any action that such officers may legally take under the statutes relating to the allowance or payment of claims against the United States." See also *Manning v. Ellicott*, 9 App. D. C. 71, 79; *Marble Co. v. Burgdorf*, 13 App. D. C. 506, 522.

For the reasons given, the order overruling the demurrer will be affirmed with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Affirmed.

MITCHELL v. EVANS.

DEPOSIT TO SECURE COSTS ON APPEAL; APPEALABLE ORDERS; PARTIES TO AN APPEAL.

Money deposited in the court below in lieu of an appeal bond and to operate as security for the costs of appeal only and not as a supersedeas of the judgment appealed from, cannot properly after the dismissal of the appeal be subjected by an order of that court to the payment of the judgment and costs which have accrued in the court below; and an appeal lies to this court from an order of that court granting a motion by the judgment creditor so to subject such deposit and overruling a counter-motion by the judgment debtor to direct the clerk to pay the money so deposited to his attorney, to whom it belongs, and the appeal is properly taken in the name of the judgment debtor; Associate Justice MORRIS dissenting.

No. 1043. Submitted February 6, 1901. Decided May 22, 1901.

HEARING on an appeal (specially allowed) by the defendant from an order of the Supreme Court of the District of Columbia directing the clerk to pay to the plaintiff, in satisfaction of his judgment, money deposited by the attorney of the defendant in lieu of an appeal bond as security for the costs of a former appeal. *Reversed.*

D. C.]

Statement of the Case.

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The COURT in its opinion stated the case as follows:

This cause was begun in the court of a justice of the peace. It has heretofore been before this court on appeal from a judgment of the Supreme Court of the District, wherein, in a trial *de novo* after removal by appeal from the justice's court, it was alleged that a new item was added to the demand which had not been included in the bill of particulars filed in the justice's court. We then held that, in a cause removed from a justice of the peace by appeal, it was not within the jurisdiction of the Supreme Court of the District to allow new items of indebtedness to be introduced on the trial *de novo* in that court; but that, as the record before us failed to show that the item alleged to have been added to the demand had actually entered into the judgment rendered, which was only for the sum of \$10 and much less than the sum total of the original account, it did not appear that the court had, in fact, transcended its jurisdiction. The appeal was accordingly dismissed. *Mitchell v. Evans*, 17 App. D. C. 233.

In order to prosecute that appeal, the attorney of John Mitchell deposited \$50 with the clerk of the Supreme Court, in lieu of an appeal bond, as permitted by law. The deposit was expressly made to operate as security for the cost of appeal, and not as a supersedeas. All the costs, to secure which the deposit was made, have been paid without drawing upon the deposit fund.

On return of the mandate to the Supreme Court, the appellee, W. Warrington Evans, plaintiff in judgment, moved therein for an order directing the clerk to pay the money over in satisfaction of the judgment and costs accrued in that court. Appellant interposed a counter-motion for an order of payment of the fund to his attorney, who had made the deposit. This was accompanied by affidavits of both Mitchell and the attorney to the effect, that the money belonged to the attorney who had deposited the same to obtain the appeal for his client; that it had not been lent to the client; and that he had no pecuniary interest, direct or indirect, in it. The facts alleged in the

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affidavits were not denied. The attorney claiming the fund filed the motion of the appellant and appeared therefor on the hearing. He did not ask leave to intervene, or to file an independent motion on his own behalf. The court overruled the latter motion and granted the former. From this order the appellant applied for a special appeal to this court, which was allowed. The appellee moved to dismiss the appeal, and the cause has been heard on that motion and on the merits.

Mr. Charles A. Keigwin and Mr. Charles A. Merrilat for the appellant.

Mr. John J. Hamilton, Mr. George E. Hamilton and Mr. M. J. Colbert for the appellee.

MR. JUSTICE SHEPARD delivered the opinion of the Court:

We are of the opinion that the court was without jurisdiction to make the order subjecting the fund in the hands of the clerk to the payment of the judgment, and hence an appeal lies to this court (assuming for the time being that it has been taken by the proper party), notwithstanding the case originated in the justice's court. *Sturges v. Hancock*, 4 App. D. C. 289.

The money did not come into the hands of the clerk, or under the jurisdiction of the court through ancillary process in the cause, or as a condition or incident of the proceedings before final judgment.

There being no fund in court subject to condemnation when the final judgment was rendered, all the remedy remaining to the plaintiff, at law, was the right to have execution upon his judgment.

In order to bring his case within the jurisdiction of the appellate court, the appellant's attorney deposited with the clerk of the Supreme Court of the District, the sum of money fixed as a substitute for the ordinary appeal bond, to secure the costs of that appeal, without supersedeas.

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Opinion of the Court.

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It is not pretended that if the appeal bond had been filed there could be any recovery thereon by the appellee, beyond the said costs.

These paid, the bond would be discharged. As the money was deposited to take the place of the security of the bond, it necessarily follows that the appellee had no lien and was entitled to no charge upon it for the payment of his judgment.

It seems conceded that money in the hands of the clerk of a court is not subject to process of attachment or garnishment, though it is probable that a court of equity might, upon a creditor's bill, compel the assignment of such a fund by an insolvent depositor. There is high authority for the exercise of such jurisdiction in equity. *Pendleton v. Perkins*, 49 Mo. 565; *Riggin v. Hillard*, 56 Ark. 476; *Speed v. Brown*, 10 B. Mon. 108; *Knight v. Nash*, 22 Minn. 452. And the principle seems to have been recognized by the Supreme Court of the United States in an analogous case. *Smith v. Bourbon Co.*, 127 U. S. 105, 111.

This being the condition of the deposit held by the clerk, the court had no jurisdiction over it save to compel the clerk to pay it to the depositor or upon his order, in event of his refusal so to do upon demand, after the payment of all costs for which it was security.

The execution of the judgment was not a judicial function. The general jurisdiction of the court, in the premises, was exhausted in the rendition of the judgment. The subsequent condemnation of property to the satisfaction of the judgment was more than the court had authority to do, and is not aided by the fact that it had jurisdiction of the subject-matter of the suit itself. *Bigelow v. Forrest*, 9 Wall. 339, 351; *Ex parte Lange*, 18 Wall. 163, 176; *Windsor v. McVeigh*, 93 U. S. 274, 283.

The remaining question is, whether Mitchell had the right to appeal from the order of condemnation of a fund of which he denied ownership and in which he disclaimed any property interest. There can be no doubt that to warrant an appeal from an ordinary judgment or decree, the party appealing

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must have some substantial interest affected thereby or involved therein. Accordingly we have heretofore held that mere trustees appointed by the court to make a sale could not appeal from an order refusing confirmation of the sale reported by them. The persons beneficially interested were parties to the proceeding and did not join in the appeal, and the trustees were not their representatives for any such purpose. *Hallam v. Oppenheimer*, 3 App. D. C. 329.

But that was a very different case from this, the circumstances and conditions of which are peculiar and exceptional.

Here, the whole proceeding has been maintained as auxiliary to the main case, in the nature of supplemental process for the enforcement of the judgment, and the special appeal was applied for and allowed upon that assumption.

When the interest of the third party — Mitchell's attorney — was made to appear by his own and Mitchell's affidavit, he did not ask leave to intervene, nor did the plaintiff seek to have him made a party to the record.

It is not clear that the third party could have intervened in this proceeding, though he might possibly have demanded the return of his money by the clerk, and, upon its refusal, filed a motion to compel the same. He preferred to urge his claim through the defendant in judgment and motion as his nominal representative.

Whilst the money was not deposited as a general loan to the defendant, it was for his benefit and the use of it raised a trust relation between him and the depositor. It was his duty to urge the appeal secured by the deposit, with some degree of diligence, and by accepting the benefit he came under obligation to repay the depositor in event the deposit should be consumed by the costs of the appeal.

This trust relation and resulting obligation were sufficient, in our opinion, to cast upon him such a legal title as authorized his representation of the beneficial owner in the proceeding and on the appeal with the knowledge and consent of the latter, and upon his express or implied request. It was not a case of formal pleading, and, under the circumstances, the action of the true owner, who appeared as the attorney

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Opinion of the Court.

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and filed the affidavits, was equivalent to an appearance and request to conduct the defense in the name of the technical or nominal defendant for his use. The defense, it will be remembered, was made, not by direct answer to the plaintiff's motion, but by way of counter-motion in which the defendant asked an order to the clerk to refund the money, not to himself, but to his attorney. The affidavits of ownership were attached to this motion. The opposing party, acquiescing, and accepting this situation with the tacit approval of the court, ought not now to be heard to raise the technical objection to the prosecution of the appeal in the name of the same nominal defendant; for it is manifest that the action of the real owner in so appearing and conducting the litigation has made the judgment conclusive of his rights unless reversed or avoided. *L. & N. RR. Co. v. Schmidt*, 177 U. S. 230.

If the representation of a technical or nominal party in a case be sufficient to render the judgment of the trial court conclusive of the rights and interests of the party represented, it would seem to follow that the latter should have the right of appeal therefrom in the name of his representative. In no other way could he obtain the appeal which is the right of all parties aggrieved by the judgment of the trial court.

For the reasons given, the motion to dismiss is overruled; and the judgment will be reversed with costs and the cause remanded with direction to dismiss the motion of the appellee for the subjection of the fund to the payment of his judgment. It is so ordered.

Reversed.

Mr. Justice MORRIS dissented.

HARTEN

v.

THE BRIGHTWOOD RAILWAY COMPANY.

CONTRIBUTORY NEGLIGENCE; STREET RAILROADS.

Where a woman, on alighting from a street car, waited for the car to start and then passed in the rear to a parallel track, where she was struck and injured by a car coming in the opposite direction and running about ten miles an hour, and it appears that she was familiar with the place and knew that a car might pass at any moment, that the track was practically straight and unobstructed for several hundred yards, that one looking up the track for the coming car could not have failed to see it, and that it was not possible for the car to traverse the space along which it was visible, between the time she should have looked for it, as she passed from one track to the other, and the moment when she stepped upon the rail and was struck, she was guilty of contributory negligence *per se*, and cannot recover for her injuries, even though she testifies that she did look to see whether a car was approaching along the track where she was struck, and did not see one coming.

No. 1087. Submitted February 15, 1901. Decided May 22, 1901.

HEARING on an appeal by the plaintiffs, husband and wife, from a judgment of the Supreme Court of the District of Columbia entered upon the verdict of a jury directed by the court in an action to recover damages for personal injuries to the female plaintiff. *Affirmed.*

The COURT in its opinion stated the case as follows:

This is an action for damages begun by Hugh Harten and wife, Julia Harten, against the Brightwood Railway Company and the Washington, Woodside and Forest Glen Railway and Power Company.

D. C.]

Statement of the Case.

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The appeal is from a judgment upon a verdict returned, by direction of the court, in favor of the defendants.

The case turned upon the testimony given by the plaintiff Julia Harten on her own behalf. She and her husband lived at Brightwood, in the District of Columbia, about four miles from Washington, on the 7th Street road. Their house is situated about fifty or more feet from the double tracks used by the defendants. There was no crossing at this place, but the cars were accustomed to stop along the way opposite the houses for the purpose of taking on and letting off passengers. She had been in the habit of riding on the cars in and out of Washington, and started home from that city about 10 A. M. on July 31, 1898. She took a seat in a car of the Washington, Woodside and Forest Glen Railway and Power Company, and paid her fare. The car stopped opposite her house at her request. She got off and passed around the rear of the car to go to her house. To reach it she was compelled to cross the adjacent track, in doing which she was run down and injured by a car of the Brightwood Company, coming from the opposite direction. She said that she looked up and down the tracks and saw no car coming, but as she went to pass over the fender struck her and knocked her upon it; that the fender struck her as she got her foot on the east rail of the track; that she looked as she was passing from behind the car, from which she had just alighted, and did not see any car, made another step, and the car struck her. She then became unconscious. She heard no bells, signals or warning calls. The space between the two tracks is about four feet wide. On cross-examination she said she could see up and down the tracks at that point some two hundred or three hundred yards. When she got off the Woodside car she took a reasonable time to get across, and waited until the Woodside car started off before she undertook to cross. Asked if there was anything to prevent her seeing three or four hundred yards up the track at that point her reply was: "Well, I looked and I did not see a car coming." Asked if there was anything to prevent her looking up the track whilst waiting, she said: "I

couldn't see up that way with a closed car." She further said that she looked when she got off the car and again when she came from behind the car and did not see the coming car. The car from which she had alighted — the closed car referred to — moved on before she crossed the track in rear of it. She walked slowly across the first track and the space intervening between it and the next track. Whilst in this space she said she looked again up the track to see if a car was coming and saw none. Asked why she did not see the coming car, she replied: "Why the car was coming at such a quick rate, I guess I couldn't very well get out of the way." This answer indicating that she referred to looking whilst on the track of the coming car, she was asked what obstruction there was to the view when she was between the two tracks, and replied that there was none. She was then asked to explain how it happened that when she looked up the road from that point she did not see a car within three or four hundred yards. Upon a repetition of the question which she failed to answer at first, her reply was: "I didn't see the car." She admitted that her eyesight was good. The witness was then further cross-examined on behalf of the other defendant. In this she said, that as soon as the Woodside car started again she started across the tracks. That she looked first when on the first track and again when between the two tracks, to see if a car was coming; that she saw no car either time, and there was nothing to obstruct the view. In final explanation of her conduct before stepping on the second track, she said: "I looked up, and I made a step, and I looked up just like that, and I didn't see nothing, and I made another step and the car struck me." It appears plainly from the evidence of plaintiff and other witnesses that there was nothing to prevent the sight of the coming car for a distance of between three hundred and four hundred yards. The sun was shining brightly. Other testimony showed that the car which struck the plaintiff was moving at the ordinary rate of speed not exceeding ten miles per hour.

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Opinion of the Court.

Mr. Charles Bendheim and *Mr. Edwin Forrest* for the appellants.

Mr. J. J. Darlington and *Mr. D. W. Baker* for the appellees.

Mr. Justice SHEPARD delivered the opinion of the Court :

It is virtually conceded by the appellant that there was no error in directing a verdict for the Washington, Woodside and Forest Glen Railway and Power Company.

Its duty ended when the plaintiff was safely deposited at the point designated by her along side the track, and it had no connection with its codefendant that would render it liable for the results of the latter's negligence or misconduct.

Giving the plaintiff the benefit of every inference that can be fairly deduced from her own account of the cause of her injuries we find no error in the instruction given to the jury to find for the defendant which inflicted them. It is unnecessary to consider whether the defendant, operating the car which did the injury, was guilty of negligence that would warrant the submission of that question to the jury, for we are of the opinion that the plaintiff was plainly guilty of contributory negligence. The accident could not have occurred had she exercised any degree of care before crossing the tracks.

She was familiar with the place and knew that a car might be expected upon the other track at any moment. The track was practically straight and wholly unobstructed for several hundred yards. One looking up the track for the coming car could not fail to see it, and it was not possible for the car to traverse the space along which it was clearly visible, between the time the plaintiff looked for it as she passed from one track to the other, and the moment when she stepped upon the rail and was struck by the fender attached to the front of the car. It would serve no useful purpose to review the many authorities cited on the argument in support of the contentions of the opposing parties. The difficulty in

class of cases lies, not in the ascertainment of the governing principle of law, but in its application to the facts of the particular case. The facts and circumstances of one case are generally so different from those of another that the decision of the one furnishes no certain rule for the determination of another. One decision that is most nearly in point is the only one binding upon us. *Northern Pacific R. Co. v. Freeman*, 174 U. S. 379. In that case, the judgments of both the Circuit Court of Appeals and the Circuit Court were reversed because of the error of the latter in not directing the jury to find for the defendant on the ground of the contributory negligence of the deceased whose representatives sued for damages. Freeman drove along the highway in a two-horse wagon. He had frequently driven over the crossing and had no defect of sight or hearing. His horses were gentle and used to the crossing and to the sight of the railway engines. He was seen by several witnesses from 200 or 250 feet away, who said that he seemed to look straight ahead. He approached the crossing at a slow trot. He did not stop until too late and was struck and killed, before he could turn aside, by the engine of a freight train. In delivering the opinion of the majority of the court Mr. Justice Brown said:— "So far, then, as there was any oral testimony upon the subject, it tended to show that the deceased neither stopped, looked nor listened before crossing the track, and there was nothing to contradict it. Assuming, however, that these witnesses, though uncontradicted, might have been mistaken, and that the jury were at liberty to disregard their testimony and to find that he did comply with the law in this particular, we are confronted by a still more serious difficulty in the fact that if he had looked and listened he would certainly have seen the engine in time to stop and avoid a collision. He was a young man. His eyesight and hearing were perfectly good. He was acquainted with the crossing, with the general character of the country, and with the depth of the excavation made by the highway and the railway. The testimony is practically uncontradicted that for a distance of forty feet from the railway

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Syllabus.

track he could have seen the train approaching at a distance of about three hundred feet, and as the train was a freight train, going at a speed not exceeding twenty miles an hour, he would have had no difficulty in avoiding it. When it appears that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in the face of all the oral testimony, that such precautions were taken. * * * If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem of how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence."

The foregoing reasoning applies with even greater force to the facts of this case.

The judgment must be affirmed, with costs; and it is so ordered. *Affirmed.*

LATNEY v. UNITED STATES.

CRIMINAL LAW; POLICE COURT; INFORMATION; COLLATERAL ATTACK;
PETIT LARCENY.

1. *Quære*, whether the act of Congress of June 17, 1870, providing that prosecutions in the police court of this District shall be by information under oath, is repealed by the act of March 3, 1891, providing "that prosecutions in the Police Court shall be by information by the proper prosecuting officer."
2. By appearing and pleading to an information for petit larceny in the police court, in which information it is alleged that it is made on

the oath of a person named therein, and submitting to be tried thereon without objection, the defendant admits the validity and sufficiency of the information, and, if convicted, cannot afterwards, when indicted for petit larceny, as a second offense, be heard in such collateral proceeding to deny the legal sufficiency of the information upon the ground that it was not sworn to, or to claim that his arrest for the first offense was illegal; Associate Justice SHEPARD, *dis-senting*.

No. 1047. Submitted April 3, 1901. Decided May 22, 1901.

HEARING on an appeal by a defendant indicted, convicted and sentenced in the Supreme Court of the District of Columbia of the crime of petit larceny as a second offense.

Affirmed.

The COURT in its opinion stated the case as follows:

This appeal comes from the Supreme Court of the District of Columbia, and is brought here by Julius Latney, the appellant, who was indicted for, tried and convicted in that court of the crime of petit larceny; and in the first count of the indictment the accused is charged with the crime as a second offense of petit larceny, under section 1161, Revised Statutes of the District of Columbia. Upon the verdict of guilty as charged in the first count, there was a motion in arrest of judgment, and also a motion for a new trial, and upon the overruling of those motions the accused was sentenced to imprisonment, and from which judgment he has appealed.

It is shown by the bill of exception taken at the trial, that, for the purpose of establishing the fact of the first conviction of the traverser of petit larceny, as alleged in the first count of the indictment, the record of the police court of the District of Columbia, showing such conviction on the 16th day of July, 1898, was offered in evidence by the prosecution. This record contains the information, made by the attorney of the United States for the District of Columbia, upon which the traverser was tried and convicted in the

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Statement of the Case.

police court. Omitting the formal parts, the information stated and alleged, that the said United States attorney, by his assistant, "gives the court to understand and be informed, on the oath of one Mandel Slimes, made on the 16th day of July, 1898, at, etc., before the said D. W. Baker, one of the assistants to the attorney of the United States as aforesaid, that one Samuel Turner, Julius Latney, and Edward Beckett, all of the District aforesaid, on the 12th day of July, in the year 1898, with force, etc., at the District and within the jurisdiction of this court, 24 pairs of stockings, each pair of the value of ten cents; 12 other pairs of stockings, each pair of the value of five cents, all lawful money, etc., of the goods and chattels of Mandel Slimes then and there being, feloniously did steal, take and carry away, against the form of the statute," etc.

This information was duly signed by the United States attorney and his assistant, with proper designation of their official character.

The Government then offered in evidence a book known as and called "Docket of Police Court, District of Columbia," wherein is kept entries of cases arising in and the disposition of the same by the said police court; and it was shown by said book or docket that one Julius Latney was arraigned in that court for the crime of petit larceny; that he pleaded not guilty to the information, was tried and convicted in said court of said charge of petit larceny, on the 16th day of July, 1898, and that the sentence imposed by the court upon the accused was a fine of \$5, or in default of payment, that he be imprisoned in jail for the term of fifteen days, and that the accused having made default in payment of the fine, he was committed to jail.

The Government followed up this evidence with proof to show the identity of the accused thus convicted and sentenced in the police court with the accused in the case at bar.

To which offer in evidence of the book or docket of entries of the police court the accused objected, upon the ground that the same was immaterial, irrelevant, and incompetent for the reason that the police court did not have the power

and jurisdiction in the premises to try the defendant, and that its judgment entered therein was an absolute nullity; and that it was shown upon the face of the information given in evidence that the same was insufficient, and that the court did not acquire jurisdiction to proceed in the case. This objection was overruled by the court, and the evidence was admitted. To which ruling the defendant excepted.

It was then proven by a police officer that he arrested the defendant several days previous to the 16th day of July, 1898, for the offense of petit larceny, and that this defendant was the same Julius Latney mentioned in the information in the police court, herein referred to. It is not stated, however, under what circumstances the arrest was made; whether the party was taken with the goods in his possession, or upon what information the officer acted in making the arrest. The testimony of the officer was objected to by the defendant, upon the ground that the information upon which the defendant had been arrested was insufficient, and that the proceedings of the police court were invalid thereunder. The objection to the evidence was overruled, and the testimony was allowed to be given,—to which the defendant excepted.

Upon the evidence offered by the Government the defendant moved the court to direct the jury to render a verdict of not guilty on the first count contained in the indictment, because the Government had failed to prove that the defendant had been legally convicted in the police court of the first offense of petit larceny. But this motion was also overruled, and the defendant excepted.

Mr. Charles A. Douglass and Mr. Levi H. David for the appellant:

1. The act of Congress of June 17, 1870, provides that "prosecutions in the police court shall be by information under oath" (Sec. 1064, R. S. D. C.); also that the "judge shall have power to issue process for the arrest of persons against whom information may be filed or complaint under

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Argument of Counsel.

oath be made" (Sec. 1050, R. S. D. C.); also that "any justice of the peace may on complaint under oath or actual view issue warrants returnable to the police court against persons accused of crimes and offenses committed in the District" (Sec. 999, R. S. D. C.). By act of Congress of March 3, 1891 (26 Stat. 848), the act creating the police court was amended, and section 2, *inter alia*, provides "that prosecutions in the police court shall be by information by the proper prosecuting officer." By act of Congress of July 23, 1892 (amended Sup. R. S. U. S. relating to the District of Columbia, vol. 2, p. 46), the second section of the act of March 3, 1891, was amended, but the same provision stands: "That prosecutions in the police court shall be on information by the proper prosecuting officer." There being no inconsistency between the act of June 17, 1870, providing that "prosecutions in the police court shall be by information under oath," and the amendatory acts of March 3, 1891, and July 23, 1892, by both of which said amendments it is provided "that prosecutions in the police court shall be by information by the proper prosecuting officer," it is submitted that the said acts of 1870 and 1891 and 1892 should be construed together; and if so, it is plain that the statute law will read: *Prosecutions in the police court shall be by information under oath by the proper prosecuting officer*. It cannot be here contended that the provisions contained in the act of 1870 requiring informations in the police court to be under oath was *expressly* repealed either by the acts of 1891 or 1892. It may be urged that the words "under oath," in the act of 1870, were repealed by implication.

It is well settled that repeals by implication are not favored, and that the proper rule of interpretation is that unless there is a manifest and irreconcilable repugnancy between the provisions of the two acts, that the former will not be construed to have been repealed by the provisions of the latter act. *Chew Heong v. U. S.*, 112 U. S. 536; *Wood v. The United States*, 16 Pet. 342; *Beals v. Hale*, 4 How. 37; *The United States v. Sixty-seven Packages of Dry Goods*, 17 How. 87; *United States v. Walker*, 22 How. 299 (reaf-

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firming Wood v. The U. S., supra); *Red Rock v. Henry*, 106 U. S. 596; *Clay County v. Society for Savings*, 104 U. S. 579. See also *Ex parte Crow Dog*, 109 U. S. 556; *Harrington v. U. S.*, 78 U. S. 167.

The prosecuting officer himself must swear to the information, or there should be filed a written formal affidavit setting out the facts and circumstances constituting the offense, showing a probable cause and forming the basis for an information. *Welch v. Scott*, 5 Ired. (N. C.) 72; *U. S. v. Turead*, 20 Fed. Rep. 621; *State v. Mann*, 5 Ired. (N. C.) 45; *Boyd v. U. S.*, 116 U. S. 616; *Davis v. The State*, 2 Tex. App. 184; *Shelton v. Berry*, 19 Tex. App. 154; *McGlinchy v. Burrows*, 41 Me. 74; *Grumon v. Raymond*, 1 Conn. 39; *D. C. v. Herlihy*, 1 MacArthur, 466; *Edwards v. McKay*, 73 Ill. 570; *Myers v. The People of State of Illinois*, 67 Ill. 503; *Dishough v. The State*, 4 Tex. App. 158; *U. S. v. Polite*, 35 Fed. Rep. 59; *Tracy v. Williams*, 4 Conn. 107; *Eichenlaub v. State*, 36 Ohio St. 140, 144; *Thornberry v. State*, 3 Tex. App. 36; *Chitty's Crim. Law* (5th Am. ed.), 34; *State v. Devine*, 4 Iowa, 443; 21 Eng. & Am. Encyc. of Law (1st ed.), 961; *Bell v. Clapp*, 10 Johns. (N. Y.) 263; *State v. Spirituous Liquors*, 37 Me. 228; *Sarah Wray's Case*, 41 Mich. 299; *People v. Heffron*, 53 Mich. 527; *Ex parte Dimmig*, 74 Cal. 164; *Gates v. The State*, 3 Ohio St. 294; *U. S. v. Maxwell*, 3 Dillon (U. S. Circuit Court Rep.) 275; *Edwards v. McKay*, 73 Ill. 570; *Crenshaw v. Taylor*, 70 Iowa, 380; *Hargadine v. Van Horn*, 72 Mo. 370; *Casey v. State*, 5 Tex. App. 462; *Burroughs v. The State*, 72 Ind. 334; *Turner v. State*, 3 Tex. App. 551; *Smith v. The State*, 3 Tex. App. 549; *Lindsey v. The State*, 72 Ind. 39.

2. If it be true that the acts of 1891 and 1892 repeal the act of 1870, and that it is no longer necessary for informations by the prosecuting officer to be under oath, or if there was in this case no affidavit supporting the charge in the information, then it would seem that the constitutional rights of the defendant were violated in the case under review. *In the Matter of a Rule of Court*, 3 Woods (U. S.), 502;

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Gates v. The State, 3 Ohio St. 294; *Lustig v. People*, 18 Colo. 217; *Sarah Wray's Case*, 41 Mich. 299.

3. If the information was fundamentally violative of the statute, or if the statute be so construed as to be in contravention of the Fourth Amendment to the Constitution of the United States — in either event, the whole proceeding in the police court on the 16th day of July, 1898, would be absolutely null and void for want of jurisdiction in said court, and the docket showing a record of said cause would not be properly admissible in evidence in the trial of the present case.

It must be conceded that the police court of this District is a court of "inferior or limited authority," deriving its powers from the statute creating it, and it was, therefore, incumbent upon the Government to show affirmatively that the said court had conformed to the statute regulating trials of accused persons in that court. No act of the defendant could confer jurisdiction, and if it can be shown that the statute which points out a method for acquiring jurisdiction has not been complied with, a judgment entered is in excess of its jurisdiction and, therefore, void. *A fortiori*, a judgment would be void if it appears that in a proceeding in said court the Constitution of the United States has been violated.

Moreover, if "want of power [of the police court] appears on the face of the record of his [appellant's] conviction *whether in the indictment or elsewhere*," the judgment of said court is an absolute nullity. *In re McCoy*, 127 U. S. 731. See also *Elliot v. Piersal*, 1 Pet. (U. S.) 328; *Hickey's Lessee v. Stewart*, 3 How. (U. S.) 750; *Thompson v. Whitman*, 18 Wall. (U. S.) 457; *Christmas v. Russell*, 5 Wall. (U. S.) 290; *Bissell v. Briggs*, 9 Mass. 462; *Pennywit v. Foote*, 27 Ohio St. 600; *Gray v. Larrimore*, 2 Abb. (U. S.) 542; *Ex parte Nielson*, 131 U. S. 176.

Mr. T. H. Anderson, United States Attorney, for the District of Columbia, and *Mr. Ashley M. Gould*, Assistant United States Attorney, for the United States.

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Mr. Chief Justice ALVEY delivered the opinion of the Court:

The questions intended to be presented by the exceptions, and which have been argued in this court, are two: 1st. That the information on which the defendant was tried and convicted in the police court was illegal, because not under oath in manner and form as the law requires; 2nd. That the arrest, trial, and conviction of the defendant under the information of July 16, 1898, in the police court, was in violation of Article IV of the Amendments to the Constitution of the United States. But these two propositions may be well considered together, as presenting one general question relating to the power and jurisdiction of the police court to try and convict the defendant.

That the police court of this District had full power and jurisdiction over the subject of petit larceny, and full power and jurisdiction to try and convict a party charged with the commission of that crime, upon information filed by the United States attorney, is not questioned. That jurisdiction is expressly conferred by the act of Congress, entitled "An act to define the jurisdiction of the police court of the District of Columbia, approved March 3, 1891," read in connection with section 1173, Revised Statutes, District of Columbia.

It is true, the police court is a statutory tribunal of special and limited jurisdiction, but that fact does not affect the question involved in this case, if the proceedings in that court show upon their face that the court had acquired jurisdiction of the subject-matter and of the person charged, even though the proceedings may have been conducted erroneously. For, as said by the Supreme Court, in the case of *Comstock v. Crawford*, 3 Wall. 396, 403, "It is well settled that when the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. The jurisdiction appearing, the same presumption of law arises that it was rightly exercised as prevails with reference to the action of a court of superior and general authority."

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In this case the party was plainly and explicitly charged in the information with the crime of petit larceny. He appeared to the information, and made no objection thereto, or to any proceeding upon which it was founded, because of supposed defects or legal insufficiencies therein, before trial. He was arraigned and pleaded not guilty, and was tried and convicted, and thereupon sentenced to imprisonment, and served out the term of confinement.

If the information had been defective and legally insufficient, as now supposed, he should have moved to quash it, or he could have sued out a writ of error and taken the case to an appellate court for review. But he did neither; and the question now is, whether he can assail the proceedings under which he was tried and convicted in the police court, for alleged legal insufficiencies therein, in the present collateral prosecution.

That gives rise to the question, What is a collateral attack? According to the authorities, that is held to be a collateral attack, when a judicial order, judgment or proceeding is offered in evidence in another proceeding, and an objection is taken thereto on account of judicial errors therein. The books furnish many familiar instances of this, as where a person relies on a judgment as a justification for a trespass, assault, or imprisonment; or to show his right or title in *habeas corpus*, replevin, trover or trespass. That the objection to the judgment for judicial errors in such cases is a collateral attack, the cases all agree. Vanfl. Coll. Attack, 5. In other words, a collateral attack on a judicial proceeding is an attempt to avoid, defeat or evade it, or to deny its force and effect, in some manner other than in a direct proceeding for its review and correction of errors therein. Here the attack is made upon the proceedings in the police court, by an objection to their admissibility in evidence, whereby it is attempted to be shown that they are void and wholly without effect.

Upon the soundest principles and the most uniform rulings of the courts, this cannot be done, except where it is clearly shown that the proceeding is utterly void for want

of jurisdiction in the court that rendered the judgment assailed. Judge Cooley, in his work on Constitutional Limitations (6th ed.), pp. 502, 503, has stated the doctrine upon this subject with as much precision and clearness as can be found in any of the authorities. He there lays it down as text law, that "when it is once made to appear that a court has jurisdiction both of the subject-matter and of the parties, the judgment which it pronounces must be held conclusive and binding upon the parties thereto and their privies, notwithstanding the court may have proceeded irregularly, or erred in its application of the law to the case before it. It is a general rule that irregularities in the course of judicial proceedings do not render them void. An irregularity may be defined as the failure to observe that particular course of proceeding which, conformably with the practice of the court, ought to have been observed in the case; and if a party claims to be aggrieved by this, he must apply to the court in which the suit is pending to set aside the proceedings, or to give him such other redress as he thinks himself entitled to; or he must take steps to have the judgment reversed by removing the case for review to an appellate court, if any such there be. Whenever the question of the validity of the proceedings arises in any collateral suit, he will be held bound by them to the same extent as if in all respects the court had proceeded according to law. An irregularity cannot be taken advantage of collaterally; that is to say, in any other suit than that in which the irregularity occurs, or on an appeal or process in error therefrom. And even in the same proceeding an irregularity may be waived, and will commonly be held to be waived if the party entitled to complain of it shall take any subsequent step in the case inconsistent with an intent on his part to take advantage of it."

This is the careful statement of the result of the authorities upon the subject, a large number of which the learned author has collected and cited in the notes to his text.

It is contended on the part of the defendant that the law requires that the information should have been founded upon oath or affidavit of the prosecuting witness, or other person

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possessing knowledge of the facts, and that the allegation in the information that it was made on the oath of one Mandel Slimes, did not gratify the requirement of the statute, and therefore the information was legally insufficient. But whether the act of Congress of June 17, 1870, which provided that prosecutions in the police court should be by information under oath, was repealed or not, by the act of Congress of March 3, 1891, which simply provides "that prosecutions in the police court shall be by information by the proper prosecuting officer," is a question that we need not decide in this case. The information, as we have seen, alleged that it was made on the oath of one Slimes, and the defendant appeared to the information, took no objection to any supposed defect therein, but pleaded thereto, was tried and convicted thereon, and served out his sentence. By thus appearing and pleading to the information, and submitting to be tried thereon without objection, the defendant, in legal contemplation, admitted the validity and sufficiency of the information, and he could not afterwards be heard to deny its legal sufficiency, and especially not in a collateral proceeding. This principle would seem to be fully settled by the Supreme Court of the United States, in the case of *Frisbie v. United States*, 157 U. S. 160. In that case, the indictment was for the violation of the pension laws, and after pleading, trial, conviction and sentence, the defendant took writ of error to the Supreme Court, where he sought to avail himself of several alleged defects in the indictment, among which was that the indictment did not show by any indorsement thereon that it had been found to be "a true bill," and was without the signature of the foreman of the grand jury. But in answer to the objection that the indictment was invalid and that the defendant could not be legally tried thereon, the court said:

"If no indictment had in fact been found by the grand jury — in other words, if there was no legal accusation against him — the defendant should have objected on this ground when the court called upon him to plead to this which it assumed to have been properly presented to it. 'The

very fact of pleading to it admits its genuineness as a record." *State v. Clarkson*, 3 Ala. 378, 383. Instead of denying the existence of any legal accusation, the defendant demurred to it on the ground of insufficiency, thus abandoning all question of form and challenging only the substance. When the demurrer was overruled he entered a plea of not guilty, and that being determined against him by the verdict of the jury, he interposed a motion for a new trial and one in arrest of judgment, without ever suggesting to the court that there was before it no indictment returned by the grand jury of the district. The objection, now for the first time made, comes too late. Whatever action the Circuit Court might have been compelled to take if the matter had been called to its attention in the first instance, the defect is not one which goes to the substance of the accusation, and will not now avail."

In that case the objection to the sufficiency of the indictment was taken in the direct proceeding, and hence the decision applies with a double force in a case like the present, where the objection is made in a collateral proceeding.

Perhaps we have no case in the books where the question as to what will constitute jurisdiction of a magistrate to hear and determine a criminal charge brought before him, though in an irregular and informal manner, was more fully and elaborately discussed, than in the case of *Reg. v. Hughes*, 2 Q. B. Div. 614, Crown Cases Reserved. In that case, Hughes, a police constable, procured to be illegally issued, without written information or oath, a warrant for the arrest of one Stanley, upon a charge of assaulting and obstructing him, Hughes, in the discharge of his duties. Upon such warrant Stanley was arrested and brought before a session of two justices, and was, *without objection*, tried by them and convicted. No objection was taken by Stanley, who defended himself, and called and examined witnesses to prove his defense, that he was not guilty. Hughes was afterwards indicted for perjury committed on the trial of Stanley, and he, Hughes, insisted that he should be acquitted, on the ground that the proceedings against Stanley were

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informal and without jurisdiction in the magistrates who heard the case. But that objection was overruled, and Hughes was convicted by Bramwell, L. J., before whom the case was tried. The case, however, was reserved to be heard by a full bench of judges assigned to hear in review crown cases reserved. The bench consisted of ten judges, and all, with the exception of Kelley, C. B., who gave no reason for nonconcurrence, concurred in affirming the conviction of Hughes, and in maintaining the jurisdiction of the magistrates before whom Stanley was tried. They held that Stanley was rightly convicted notwithstanding that there was neither written information nor oath, to justify the issue of the warrant against Stanley, and that the justices had jurisdiction to hear and determine the charge, though the warrant upon which the party was arrested and brought before them had been illegally issued.

In the present case the record from the police court does not disclose how or by what means the defendant was brought before that court, though the police officer testified that he had arrested the defendant several days before the trial, and we may, therefore, assume that the party was brought into court in custody of a police officer. But from what subsequently occurred in court, the manner of bringing the defendant before it is quite immaterial to the question of jurisdiction of the court to try and convict the defendant on the information before it. The question of the illegal arrest of Stanley in the case of *Reg. v. Hughes, supra*, was much pressed in argument by counsel to show the want of jurisdiction; but the whole nine judges who concurred in affirming the conviction of Hughes, concluded, that the illegal arrest of Stanley did not affect the jurisdiction of the justices to try the case. It was brought before them, and they were bound to try and dispose of it. Mr. Justice Hawkins, in a most thorough and able opinion, and which seems to have been the leading opinion in the case, in treating of that contention, said: "The information, which is in the nature of an indictment, of necessity precedes the process; and it is only after the information is laid, that the question as to

the particular form and nature of the process can properly arise. Process is not essential to the jurisdiction of the justices to hear and adjudicate. It is but the proceeding adopted to compel the appearance of the accused to answer the information already duly laid, without which no hearing in the nature of trial could take place (unless under special statutory provision). If a mere summons is required, no writing or oath is necessary. A bare verbal information is sufficient. If a warrant is required, then, and for that purpose only, an oath substantiating the information is requisite, not only by the provisions in the Jervis's acts, so often referred to, but by the common law, of which it was always a doctrine that a warrant which deprives a man of liberty ought not to issue without oath of the truth of the information. To justify a warrant, I am also of opinion that a written information is necessary."

In another part of the same opinion, the learned judge said: "If the contention on the part of the defendant be correct, then Stanley, even though he had suffered the whole imprisonment to which he was sentenced, would be liable to be tried again, and could not plead *autrefois convict*; and if he had been acquitted would have been in no condition to plead *autrefois acquit*. Two very startling consequences. A flood of authorities might be cited in support of the proposition that no process at all is necessary when, the accused being bodily before the justices, the charge is made in his presence, and he appears and answers to it. In 2 Hawk. 28, it is said: 'It seemeth plain, from the nature of the thing, that there can be no need of process when the defendant is present in court, but only where he is absent.' In *Rex v. Stone*, 1 East, 649, Lord Kenyon said: 'Justice requires that a party should be duly summoned and fully heard before he is convicted; but if he be stated to be present at the time of the proceeding, and to have heard all the witnesses, and not to have asked for any further time to bring forward his defense, if he had any, this at all times has been deemed sufficient.' " There are many other authorities cited and quoted from in the course of the opinion to the same effect.

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There are many well-considered American cases that fully accord with the principle of the English case just cited. Indeed, the principle would seem to be universal that where an information or complaint is filed charging a crime over which the court has jurisdiction, the court has the power to cause the defendant to be brought before it to answer the charge, and when he is actually before the court and is called upon to plead, if he has any objection to make as to the manner in which he was brought before it, he ought to make the objection then, and move to quash the information, or that he be discharged therefrom. As has been well said, public policy, as also protection to parties accused of crime, requires that such principle should be applied. A great many arrests are made without warrant, and, if the character and circumstances of such arrests could, after trial and judgment, be inquired into and proved, to defeat the jurisdiction of the court and render the judgment void, not only would the administration of justice be obstructed, but the judgment, whether of conviction or acquittal, would be no protection to the defendant; no bar to a subsequent prosecution for the same offense, even though he should have suffered the punishment inflicted on first conviction; as was the case in the present instance. The legality or illegality of the arrest of the accused does not affect the jurisdiction of the court, nor the guilt or innocence of the accused. Trial courts, whether State or Federal, will not, upon the trial of an indictment or information against an accused, upon a plea of not guilty, inquire as to whether or not the defendant was properly or improperly brought within the jurisdiction of the court. A party accused cannot claim immunity from crime upon any such ground. *New Jersey v. Noyes*, 18 Fed. Cases, 84; *Brown v. Fitzgerald*, 51 Minn. 534; *Com. v. Gregory*, 7 Gray, 498; *People v. Velarde*, 59 Cal. 457; *State v. Longton*, 35 Kans. 375; *State v. Dibble*, 59 Conn. 168; *State v. Regan*, 67 Me. 380; *Elmore v. State*, 45 Ark. 243; *State v. Day*, 58 Iowa, 678; *Ledgerwood v. State*, 134 Ind. 81; *Aderhold v. City of Anniston*, 99 Ala. 521.

To state the special facts of each of the several cases just

cited would unduly prolong this opinion; but, upon examination, they will all appear fully to support the principles that we have stated. And as we find no error in the rulings of the court below its judgment must be affirmed; and it is so ordered. *Judgment affirmed.*

Mr. Justice SHEPARD dissented.

UNITED STATES v. DAVIS.

HABEAS CORPUS; CRIMINAL LAW; INFORMATION; POLICE COURT; COLLATERAL ATTACK.

1. The writ of *habeas corpus* cannot be made to perform the office of a writ of error, and where a party by such means seeks to be discharged from imprisonment under a judgment of conviction of a court of competent jurisdiction, he must clearly show that the judgment, for causes apparent upon its face, is an absolute nullity, as the question of errors or defects in the proceeding upon which the conviction is founded will not be entertained in a collateral proceeding by *habeas corpus*.
2. A judgment of conviction of the police court of this District based upon an information alleging that the defendant is charged upon the oath of a person named therein, is not a nullity, under the act of Congress of June 17, 1870, requiring the information to be under oath, although there is no separate affidavit made by the prosecuting witness or some other person possessing knowledge of the facts, and a defendant in custody under such a judgment is not entitled to be released upon *habeas corpus* proceedings; *following* Latney v. United States, *ante*, p. 265; Associate Justice SHEPARD *dissenting*.

No. 1056. Submitted April 9, 1901. Decided May 22, 1901.

HEARING on an appeal by the United States, from an order of the Supreme Court of the District of Columbia, in a *habeas corpus* proceeding, discharging the petitioner from custody of the warden of the jail. *Reversed.*

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The facts are sufficiently stated in the opinion.

Mr. T. H. Anderson, United States Attorney, for the District of Columbia, and *Mr. Ashley M. Gould*, Assistant United States Attorney, for the United States.

Mr. A. S. Colyer for the appellee filed no brief.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This is an appeal from the Supreme Court of the District of Columbia, in matter of *habeas corpus*, wherein the petitioner for the writ, the present appellee, was discharged, and the United States have appealed.

The petitioner for the writ alleged that he was arrested, tried, convicted, and sentenced to prison on November 1, 1900, by the police court of this District, for an assault, and that he was sentenced to jail for 11 months and 29 days. He alleged that he was illegally and unlawfully restrained of his liberty and held in jail by the warden thereof, by virtue of a commitment issued by the said police court. The only ground alleged as constituting illegality in the proceedings, is that the information upon which he was tried was not an information such as is required under section 1064 of the Revised Statutes of the District of Columbia, and was also in violation of the Fourth Amendment to the Constitution of the United States.

The proceeding in the police court is not exhibited as part of the petition, nor was there issued a writ of *certiorari* as ancillary to the writ of *habeas corpus* to have the record of conviction in the police court produced. But a copy of the information upon which the party was tried appears filed in the case; and we shall assume that it was properly filed.

The information filed in the police court, upon which trial and conviction were had, recites and states that the attorney of the United States for the District of Columbia "comes here into court, at the District aforesaid, on the 15th day of

October, 1900, and for the United States gives the court here to understand and be informed on the oath of one William J. Quinlan, made on the 15th day of October, in the year aforesaid, at, etc., before the said Alexander R. Mullowny, one of the assistants to the said attorney of the United States, that one Lewis Davis, on the 13th day of October, 1900, with force, etc., at said District, and within the jurisdiction of this court, in and upon William Young did make an assault, and him the said Young then and there did beat, wound," etc.

The writ of *habeas corpus* was issued as prayed, and in the return thereto, the warden of the jail certified that Davis was received by him and since held in prison by virtue of a commitment by the judges of the police court, the said commitment reciting the sentence of the said court of Davis to imprisonment for the period of 364 days from said date, in the jail of the District, and to which return was annexed a copy of said commitment.

It was upon this return that the case was heard, and upon the hearing the petitioner was discharged. And the sole question in the case is, whether the police court had power and jurisdiction to try, convict, and sentence the accused for the crime of assault and battery? If such jurisdiction existed, and the judgment rendered was not in excess of the jurisdiction, to an extent to render the judgment absolutely void, clearly the petitioner was not entitled to be discharged on writ of *habeas corpus*.

That the police court had full and complete jurisdiction over the subject-matter of the crime charged against the accused, with power to try and convict therefor, on information, can admit of no question. It is only necessary to refer to the act of Congress of March 3, 1891, entitled "An act to define the jurisdiction of the police court of the District of Columbia;" and, by the second section of that act it is provided, "that prosecutions in the police court shall be on information by the proper prosecuting officer." It is equally clear that the court had jurisdiction of the person of the accused, as he appeared in court, pleaded to the information,

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and submitted to trial thereon, without showing or attempting to show, for aught that appears in this case, that he made any objection to the legality of the proceeding against him.

The question of the jurisdiction of the police court, and the binding effect of the judgment thereof, and the principle of presumption in support of such judgment, when sought to be attacked in a collateral proceeding, has been fully considered in the preceding case of *Julius Latney v. United States*, in an opinion delivered in that case. This case could well be rested on the principles stated in that case, and which are conclusive of everything involved in the present case. But as that case was not one of *habeas corpus*, but involved the question of the admissibility of the record of conviction of a first offense on the trial of a charge of a second offense of like character, we deem it proper to refer to some authorities, in addition to those referred to in that case, of special and direct application.

That a writ of *habeas corpus* cannot be made to perform the office of a writ of error, is a principle in regard to which all authorities agree in holding. When a party is in prison in execution of a judgment or sentence of a court of competent jurisdiction, he cannot be released on *habeas corpus*, unless he can clearly show, that the judgment, for causes apparent upon its face, is an absolute nullity. The question of errors or defects in the proceeding upon which the conviction is founded will not be entertained, in a collateral proceeding by *habeas corpus*. This doctrine is nowhere more clearly stated than by Chief Justice Marshall, in the leading case of *Ex parte Watkins*, 3 Pet. 193.

In that case, Watkins petitioned the Supreme Court of the United States for the writ of *habeas corpus* for the purpose of inquiring into the legality of his confinement in the jail of the District of Columbia, by virtue of a judgment of the circuit court of this District, rendered in a criminal prosecution instituted against him in that court. He alleged in his petition that the indictment under which he was convicted and sentenced to imprisonment charged no offense for which the prisoner was punishable in that court, or of

which that court could take cognizance; and, consequently, the proceedings were *coram non judice*. But the Supreme Court held that it was not shown that the judgment was a mere nullity, and that it had no power to examine the record and determine whether there were errors or defects in the indictment or not. The Chief Justice said:—"But with what propriety can this court look into the indictment? We have no power to examine the proceedings on writ of error, and it would seem strange if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." And again the court said: "If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it. If the judgment be obligatory, no court can look behind it. If it be a nullity, the officer who obeys it is guilty of false imprisonment. Would," asked the Chief Justice, "the counsel for the prisoner attempt to maintain such position?"

The case of *Ex parte Lange*, 18 Wall. 163, was an application to the Supreme Court of the United States for the writ of *habeas corpus*, wherein the petitioner alleged that he was detained in prison by an illegal judgment of the Circuit Court of the United States. The writ was granted, and, upon the return, it was held by a majority of the court, against a strong dissent, that the judgment in the Circuit Court showed *upon its face and by its terms* that it was an

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utter nullity, and consequently the party was entitled to his discharge.

In the recent case of the *United States v. Pridgeon*, 153 U. S. 48, the application was for a writ of *habeas corpus*, founded upon a wrong description in the indictment of the territorial jurisdiction of the court that tried and convicted the party. The indictment was found in the district court of the United States within and for Logan County in Oklahoma Territory, and for the Indian country attached thereto, charging the offense of horse stealing, and laying the venue of the offense, "at and within that part of the Territory of Oklahoma attached for judicial purposes to Logan County," with a description of territory which included part of Oklahoma and part of the Cherokee Outlet not in Oklahoma, and which averred the same to be "then and there Indian country, and a place then and there under the sole and exclusive jurisdiction of the United States." The party was arraigned, pleaded, tried, and convicted on this indictment, and was sentenced to the penitentiary. In his petition for the writ of *habeas corpus* it was alleged that the party was wrongfully restrained of his liberty, because the court that tried and convicted him had no jurisdiction in the premises, and that its judgment was void. The writ of *habeas corpus* was issued, and, upon hearing, the party, as in the present case, was discharged; but that ruling was by the Supreme Court of the United States adjudged to be erroneous. That court, by a unanimous opinion, held that the indictment was not so radically defective, when attacked collaterally by writ of *habeas corpus*, as to justify the court in holding that the district court had no jurisdiction over the person and the offense tried, and consequently the party was not entitled to be discharged. It was there said by the court, that under a writ of *habeas corpus* the inquiry is not addressed to errors, but to the question whether the proceedings and judgment are nullities; and unless it appear that the judgment or sentence under which the prisoner is confined is void, he is not entitled to his discharge.

In the opinion of the court, delivered by Mr. Justice

Jackson, it is said: "If the indictment does not fairly and sufficiently aver that the offense in question was committed in the Cherokee Outlet, it certainly does not show affirmatively upon its face that it was committed elsewhere, and without the jurisdiction of the court. It may be that upon demurrer or writ of error, the indictment might have been found defective in not alleging with greater certainty the particular locality in which the offense was committed, within the rule laid down in *McBride v. The State*, 10 Humph. 615, but it cannot be properly held that the indictment is so fatally defective on its face as to be open to collateral attack after trial and conviction, or that the sentence of the court pronounced thereon was void. The *habeas corpus* proceeding being a collateral attack of a civil nature, *it must clearly and affirmatively appear that the indictment charged an offense of which the court had no jurisdiction, so that its sentence was void.* This does not appear in the present case, and the second question certified must, therefore, be answered in the negative."

The principles of the cases to which we have referred are laid down in numerous cases, both State and Federal, but we deem it unnecessary to refer to others than those to which we have called attention. These latter would seem to be entirely conclusive of the present case. As we have seen, the ground of objection to the information here is, that it is not alleged that there was a separate and independent affidavit made by the prosecuting witness or some other person possessing knowledge of the facts, upon which the information should be founded. But, if it be conceded that the provision of the act of Congress of 1870, requiring the information to be upon oath, was not repealed by the subsequent act of Congress of March 3, 1891, the allegation in the present information would seem to be all that was necessary to gratify the terms of the statute — certainly after trial and conviction, and upon collateral attack. The allegation in the information is that the party is charged "upon the oath of one William J. Quinlan, made on the 15th day of October, in the year 1900, before one of the assistants to the district attorney of the United States." No greater certainty than

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this could be required in proceeding on *habeas corpus* after conviction. www.libtool.com.cn

We are clearly of opinion that there was jurisdiction in the court to try and convict the accused, and that there is nothing apparent to show that the conviction and sentence were nullities. We must, therefore, reverse the order of the court below discharging the petitioner, and remand the cause; and it is so ordered. *Order reversed.*

Mr. Justice SHEPARD dissented.

UNITED STATES v. CHAMBERS.

SAME v. WALLINGSFORD.

SAME v. JACKSON.

SAME v. WHITLEY.

SAME v. FLEET.

Nos. 1067, 1068, 1069, 1060 and 1061. Submitted April 9, 1901. Decided May 23, 1901.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

In the several foregoing cases, it has been stipulated and agreed that the determination thereof shall follow and be

the same as the determination of No. 1056, the case of *United States v. Lewis Davis*, just decided. As that case is reversed and remanded to the court below, the same judgment will be entered in the several above-entitled cases; and it is so ordered.

Orders appealed from reversed and causes remanded.

Mr. Justice SHEPARD dissented.

MAGRUDER v. SCHLEY.

EQUITY; FRAUD; PROMISSORY NOTES; RESTRAINING ORDERS.

Where a bill in equity by the maker of a promissory note to enjoin the issue of execution upon a judgment against him, obtained by the defendants as holders of the note by indorsement from the payee, states that the note was fraudulently procured from him by the payee and that he believes and expects to prove that the defendants had knowledge or notice of the fraud, but no facts are stated either upon personal knowledge or upon information reasonably sufficient upon which to base his belief, a temporary restraining order granted upon the filing of the bill is properly dissolved, especially where the defendants in their answers expressly deny any fraud on their part or any knowledge or notice of fraud by them.

No. 1006. Submitted April 10, 1901. Decided May 23, 1901.

HEARING on an appeal (specially allowed) by the complainant from an order of the Supreme Court of the District of Columbia dissolving a temporary restraining order granted at the instance of the complainant in a suit in equity to enjoin execution on a judgment against him. *Affirmed.*

The facts are sufficiently stated in the opinion.

Mr. Franklin H. Mackey for the appellant.

Mr. T. Percy Meyers for the appellees.

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Mr. Justice MORRIS delivered the opinion of the Court:

This cause comes to this Court on a special appeal allowed from an order of the Supreme Court of the District of Columbia dissolving a restraining order or temporary injunction previously allowed by that court: and it is the second branch of a litigation which was before us on a former appeal (17 App. D. C. 227).

The litigation was begun by a suit at common law upon a promissory note for \$1,050.50, given on March 29, 1897, by the appellant John H. Magruder to one T. C. Crawford, payable thirty days after date, and which was a renewal of a previous note. The note had been indorsed by Crawford to the firm of Moore & Schley, of which the appellees, other than T. Percy Myers, are the surviving partners, Moore being deceased. On April 14, 1900, the firm of Moore & Schley instituted suit on the note, and filed therewith an affidavit intended for the purpose of procuring summary judgment under the 73d rule of the court below providing for such summary judgments. The appellant, as defendant in that suit, filed an affidavit of defense, which was deemed insufficient; and the court rendered judgment under the rule. Thereupon the appellant moved to vacate the judgment, and for leave to file an amended affidavit of defense, which was exhibited with the motion; but this motion the court refused. Upon appeal to this court the judgment was affirmed.

In the opinion then pronounced by this court it was stated that we could not consider the second or amended affidavit, as it was not properly in the record before us; but that it indicated sufficient to justify further inquiry into the matter either through proceedings in equity or otherwise. Acting upon this suggestion, as it would seem, the appellant instituted the proceeding in equity which is now before us for review.

Divested of some useless and unnecessary allegations, the bill of complaint is to the effect substantially that the note in question was procured from the complainant by fraud, and that the partners of the firm of Moore & Schley are chargeable with notice or knowledge of the fraud. The al-

legations are, that the note was procured from the complainant by the payee Crawford in payment of forty shares of the stock of a Voelker Light Company, a corporation of the State of New Jersey, for which shares of stock a certificate or order was delivered by Crawford to the complainant, with the assurance that, if the complainant could not pay the note when it became due, or if he did not then wish to take the stock, Crawford would then take back the stock and return the note; that this note was for \$1,000 payable in ten months; that shortly before this note became due the complainant informed Crawford that he would not be able to pay it, and that he would surrender the stock; that Crawford then for the first time informed the complainant that the note had been cashed or discounted by the appellee Chapman, of the firm of Moore & Schley, but that he (Crawford) had arranged with Chapman to have a renewal note, payable in thirty days, with the stock attached as collateral security, taken therefor and deposited with the firm of Moore & Schley; that thereupon the note in controversy was executed by the complainant and delivered, with the certificate of stock annexed, to the agents of Moore & Schley in Washington; that before this last-mentioned note became due, the complainant notified Crawford that he could not pay it and that he surrendered the stock; that he heard no more of the matter until a short time before the suit at law was instituted, when demand for its payment was made on him by the attorney for Moore & Schley; and that thereupon the proceedings at law were had which have been mentioned.

The bill of complaint then proceeds to aver that the complainant believes, and expects to be able to prove, that the whole transaction was a fraud by Crawford upon the complainant; that Crawford was not the owner of the stock, but either Chapman or the Voelker Light Company; that, if any money was advanced upon the note by Moore & Schley, it was for the benefit of Chapman or the Light Company; that Crawford was vice-president and Chapman was treasurer of that company; and that Chapman was chargeable with notice, either actual or constructive, of the arrangement between Crawford and the complainant.

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The prayer of the bill is for a temporary restraining order, for a trial by jury, and for general relief.

It may be remarked that the appellee Myers, the attorney of the firm of Moore & Schley, was made a party to the bill only because the complainant could not procure service of process upon the members of the firm of Moore & Schley, who are all nonresidents of the District of Columbia.

Upon the filing of this bill the complainant procured a temporary restraining order against the execution of the judgment at law, to be effective until the further order of the court. This order the appellees, upon being notified of it, promptly moved to dissolve; but their motion was denied. Thereupon they answered the bill; and in their answer they denied any knowledge whatever on the part either of Chapman or of the firm of Moore & Schley of any arrangement between the complainant and Crawford. They denied also that the stock sold by Crawford to the appellant was the stock either of Chapman or of Moore & Schley; and they averred that they had no knowledge of its belonging to the Light Company. And further they denied that there was any agency of Crawford to act for them or any of them, or any association whatever between him and them for the promotion of the sale of the stock of the Voelker Light Company. They then renewed their motion to discharge the restraining order, and their motion was now allowed, and an order was entered to that effect.

From this order dissolving the preliminary restraining order or temporary injunction granted in the cause the complainant has been allowed a special appeal to this court.

We are entirely satisfied that the decision of the court below in the premises was right, and that it should be affirmed. If it can be assumed that there is any equity shown in the bill of complaint against the appellees, that equity is completely sworn away by the answers, and no ground is left for the continuance of the restraining order. But we are satisfied that there is no equity in the bill of complaint as against the appellees. It may be that a fraud was perpetrated upon the complainant by Crawford, of which, of

course, it is not proper for us here to express any opinion, since Crawford is not a party to this suit; but if such a fraud was perpetrated, the bill of complaint wholly fails to connect the appellees, or any of them, with it. There is no allegation anywhere in the bill that the firm of Moore & Schley, or any member of that firm, had any knowledge whatever of that fraud, if fraud there was, or any connection with it: nor is there any statement of fact, made either upon personal knowledge or upon information and belief, that would justify an inference of any such knowledge or connection. The statement is that the complainant believes and expects to prove some things. Now his belief and expectation may be in good faith; but it has been repeatedly held that suspicion is not proof; and it is equally true that belief and expectation to prove cannot be accepted as a substitute for fact. The complainant carefully refrains from stating that he has any information upon which to found his belief or to justify his expectation; and evidently he has no such information. But belief, without an allegation of fact either upon personal knowledge or upon information reasonably sufficient upon which to base the belief, cannot justify the extraordinary remedy of injunction. It is very clear that the bill of complaint is simply inspired by a vague hope that, in a further investigation, by cross-examination or otherwise, something might be elicited to justify the complainant's suspicion. Plainly this will not suffice for a proceeding in equity, least of all in a proceeding where an injunction is sought. With a bill of complaint so fatally defective in allegation of fact, and answers to it completely denying all equity that might be supposed to inhere in it, it was eminently proper to dissolve the injunction or restraining order that had been granted in the first instance, and the order of dissolution will, therefore, be affirmed.

Our conclusion is that the order appealed from should be, and it is hereby affirmed, with costs; and that the cause be remanded to the Supreme Court of the District of Columbia for such further proceedings, if any, as may be proper and according to law. And it is so ordered.

Affirmed.

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Syllabus.

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RICHARDS v. BIPPUS.

HUSBAND AND WIFE; ESTOPPEL; BILLS AND NOTES; USURY.

1. Where, in a suit by a married woman on a note payable to her, her uncontradicted testimony is that the money loaned was not acquired by gift from her husband, but was her separate property acquired from the sale of her real estate in Georgia, it will *probably* not be presumed, in the absence of proof of the law of Georgia relating to the property rights of married women, that the common-law rule which would make the proceeds of such a sale the property of the husband, prevails in that State; or that the husband's acquiescence to the wife's claim to the money after its receipt makes it hers by gift or conveyance from him, within the meaning of R. S. D. C., Secs. 727-729.
2. Where one borrows money from a married woman and gives his promissory note for it, payable to her and not to her husband, and is given credit for payments made upon it, and has no pretense of set-off or counterclaim against the husband, he is estopped to deny her capacity to sue on the note for the sole purpose of avoiding payment of the debt.
3. A promissory note or other obligation is affected with usury if the principal makes the loan knowing that his agent has exacted a bonus or commission, though for his own sole benefit, which, with the interest payable to the principal, would amount to more than the rate permitted by law.
4. In a suit on a promissory note, payable six months after date with interest, where the contract is shown to have been usurious, while recovery can be had of the principal only, interest is recoverable at the rate of 6 per cent. per annum, after maturity of the note; *construing* Sec. 713, R. S. D. C., imposing the rate of 6 per cent. interest per annum upon the loan or forbearance of money; Sec. 714, id., making it lawful to contract in writing for 10 per cent. or less; Sec. 715, id., providing that if more than 10 per cent. shall be contracted for, the whole of the interest contracted for shall be forfeited and the principal only recoverable; and Sec. 829, id., providing that 6 per cent. per annum shall be awarded on all judgments in action upon contracts until satisfied, "and the amount which is to bear interest and the time for which it is to be paid shall be ascertained by the verdict of the jury sworn in the cause."

Note 1051. Submitted April 11, 1901. Decided May 22, 1901.

HEARING on an appeal by the defendant from a judg-

ment of the Supreme Court of the District of Columbia, entered upon the verdict of a jury directed by the court, in an action upon a promissory note. *Modified and affirmed.*

The COURT in its opinion stated the case as follows:

This action was begun by Eunice C. Bippus, as plaintiff, in the Supreme Court of the District, to recover upon a note for \$350 executed by Charles S. Richards, September 6, 1894, and payable six months after date to the order of said Eunice C. Bippus, with interest at 10 per cent. per annum. Credits to the amount of \$35 were admitted.

In addition to a formal plea of *non-assumpsit*, defendant pleaded, first: That plaintiff was, at the time of the execution of the note, and is now, the wife of one John Bippus, and the cause of action is not in relation to her separate estate; and, second: That the transaction was usurious.

Upon these pleas issue was joined. Plaintiff testified on her own behalf by deposition taken in Colorado. She said that she and her husband, John Bippus, were living in the District of Columbia on and before the date of the execution of the note. She had \$300 in money, which was her separate property, derived from the sale of her real estate in the city of Atlanta, Georgia; and that it was not acquired by her, directly or indirectly, by gift or conveyance from her husband.

This money she lent to Richards on September 6, 1894, who executed his note to her for \$350.

In reply to the interrogatory, "If you only gave \$300, why was the note drawn for \$350?" she answered: "The loan was negotiated by my husband, Mr. John Bippus, for Mr. Richards, the defendant. Mr. Richards promised to pay Mr. Bippus a commission of \$50 for the latter's services in the transaction. As a matter of convenience, this \$50 was included in the note and is to be paid to Mr. Bippus by me when the note is paid." John Bippus received the note and delivered it to plaintiff, who thereafter held it.

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Argument of Counsel.

Defendant testified that he received \$300 from John Bippus, who represented the money as his own, and agreed to pay him a bonus of \$50 for making the loan; that Bippus wanted the note payable to his wife, "because he had some financial troubles in the South," and defendant executed it as written. He also said that the first payment upon the note was by check for \$25 payable to John Bippus, whose letter acknowledging the same was produced, under date October 1, 1896. The letter expressed the hope that defendant would remit more during the month upon the reason, thus expressed, "as my expenses more than eat up my income."

The court refused a prayer for a charge to the jury to find for the defendant if they believed the money received was not the separate property of the plaintiff, and also one that the plaintiff could recover, if at all, only the actual sum lent the defendant less the credits shown. At request of the plaintiff, the court instructed the jury to find for her the sum of \$300 with 10 per cent. interest from date to the maturity of the note and 6 per cent. per annum thereafter, less \$35 of credits. Defendant excepted to the several rulings of the court and appealed from the judgment rendered upon the verdict, returned in accordance with the instruction aforesaid.

Mr. W. C. Prentiss for the appellant:

1. The appellee fails to trace to Richards' hands the money claimed to have been hers. If her husband was the real principal, as the testimony of Richards tends to show, the note in legal effect was payable to him and he could sue alone thereon (*State v. Krebs*, 6 H. & J. 37), and title in a stranger would have to be derived through indorsement by him. But the wife claims, not as purchaser, but as payee, and the burden is on her to show that she was the real principal, disclosed or undisclosed. See *Trimble v. Thorson*, 80 Iowa, 246.

2. There is no evidence of separate estate. It is incumbent upon the wife to allege and prove the facts establishing

separate estate, and giving her a right to sue. *Edwards v. Sheridan*, 24 Conn. 165; *Ridgeley v. Crandall*, 4 Md. 442; *Barr v. White*, 22 Md. 265; *Fiske v. Bigelow*, 2 MacA. 427; *Offutt v. Dangler*, 5 Mackey, 313; *Foertsch v. Germulder*, 9 App. D. C. 357. The burden is upon the wife to establish separate estate, and the presumption is always that money or property belongs to the husband. *Scitz v. Mitchell*, 94 U. S. 580; *Reeves v. Webster*, 71 Ill. 307; *Johnson v. Johnson*, 72 Ill. 489; *Quigley v. Swank*, 11 Pa. Sup. Ct. 602; *Hord v. Owens*, 20 Tex. Civ. App. 21; *Clark v. Clark*, 21 Tex. Civ. App. 371; *Hydrick v. Burk*, 30 Ark. 124; *Hewitt v. Burritt*, 3 App. D. C. 229; *Edwards v. Entwisle*, 2 Mackey, 43.

3. In the absence of proof to the contrary, the property rights of married women in the States will be presumed to be the same as in this District. *Howard v. C. & O. RR. Co.*, 12 App. D. C. 300. Or that the common law is still in force. *Van Ingen v. Brabrook*, 27 Ill. App. 401; *King v. O'Brien*, 33 N. Y. Sup. Ct. 49; *Hydrick v. Burk*, 30 Ark. 124. And the burden is still upon her to show how she acquired title, the presumption being that the husband's money purchased. *Quigley v. Swank*, *supra*; *Clark v. Clark*, *supra*; *Hydrick v. Burk*, *supra*; *Storrs v. Storrs*, 23 Fla. 274. And this burden is not removed by her answer in the negative to the direct interrogatory—"Was it (the money loaned Richards) or any part of it, acquired by you, directly or indirectly, by gift or conveyance from your husband?"—for her answer is merely a conclusion of law from facts not disclosed. *Johnson v. Johnson*, 72 Ill. 489.

4. If the plaintiff's proof does not wholly fail, it is not conclusive. The appellee's testimony being taken on written interrogatories, the onus is more strongly upon her to disclose the facts. In such case, imperfect and evasive answers go to credibility. Weeks on Depositions, Sec. 504.

5. Had the husband been acting as agent, lending his wife's money, he would, no doubt, have taken a note payable to himself for his bonus, as is usually done in such cases. *Trimble v. Thorson*, 80 Iowa, 246.

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Argument of Counsel.

6. There is no escape from the taint of usury. Viewing the transaction in the light most favorable to the appellee and admitting, for the sake of the argument, that the husband was not principal in the transaction, we have the case of the lender's agent exacting a commission of 33 1-3 per cent. per annum in addition to interest at 10 per cent. per annum, and including the commission in the principal of the note drawn to the order of the lender, with the knowledge and approval of the lender, who accepts the note and sues upon it, claiming the full amount in her declaration and affidavit under the 73d Rule. In *Sullivan v. Snell*, 1 MacA. 587, a note for \$500 at 90 days, negotiated for \$460 to the first holder, was held usurious. A bonus included in the principal of a note is treated as interest, and if, added to the interest expressed, it exceed the legal rate, the transaction is usurious. 27 Encyc. of Law, 1009. Upon the general subject of commissions or bonuses, see *Upton v. O'Donahue*, 49 N. W. Rep. 267; *Bank v. Flint*, 54 Ark. 40; *Ammondson v. Ryan*, 111 Ill. 506; *Borcherling v. Trefz*, 40 N. J. Eq. 502; *Meers v. Stevens*, 106 Ill. 549; *Sherwood v. Roundtree*, 32 Fed. Rep. 113.

Mr. Thomas M. Fields for the appellee:

That the matters recited in evidence do not charge the appellee with usury, see Abb. Tr. Ev. 1010, 1011, and cases cited; *Leonhard v. Flood*, 56 S. W. Rep. 781; *Dellerby v. Goodwyn*, 37 S. E. Rep. 376; *West v. Equitable Mortgage Co.*, 37 S. E. Rep. 357. Even a court of equity will not relieve against usury unless the loan with legal interest has been repaid. *Stanley v. Gadsby*, 10 Pet. 521; *Chapman v. Clark*, 3 Mackey, 185. Even actual usury between Richards and John Bippus, of which the appellee had no knowledge or to which she was not a party, could not affect her. *Moncure v. Dermott*, 13 Pet. 345. So the payment of a sum in addition to legal interest, when dependent upon a contingency, does not render the transaction usurious. *Spain v. Brent*, 1 Wall. 604. Commissions paid by a borrower to

a third person will not render the loan usurious. *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105.

The appellant has suffered nothing whatever from the alleged usury. He has not paid it. Even the small sum which he has paid was not applied to the \$50 commissions, as it could have been, but was credited upon the actual money and interest due from him. His defense in this cause is utterly devoid of moral and legal support, and is only an attempt to avoid what he himself admits to be a just and unpaid loan by supposed legal technicalities. The judgment merged the note, and he can never be called upon by any person to pay the \$50, about his mere agreement to pay which — not payment or liability for payment — he makes so much complaint, and by reason of which he seeks to evade his just debt which he owes to the appellee. He shows no case which entitles him to any aid from a court of justice.

Mr. Justice SHEPARD delivered the opinion of the Court:

1. There was no error in refusing the defendant's prayer for an instruction founded on his first plea. Plaintiff's direct evidence that the money lent to defendant was her separate property, underived by gift or conveyance from her husband, is assailed as insufficient because it appears that it was obtained from the sale of her land in Georgia. The contention is, that in the absence of proof of the law of Georgia relating to the property rights of married women, the presumption is that the rule of the common law prevails there; and that, consequently, the proceeds of the sale of her land became the property of her husband. And it is further contended that, if after receiving the money the husband acquiesced in the wife's claim to it, it then became hers by his gift of conveyance, and was not her separate property under the statute conferring upon her the right to sue and be sued concerning the same in her own name as if she were unmarried. R. S. D. C., Secs. 727, 729.

The positive, and wholly uncontradicted, statement of the wife that the money lent to the defendant had not been ac-

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quired by gift from her husband, but was her separate property in Georgia, was probably sufficient indirect proof, to prevent the raising of the mere presumption of the existence of the common-law rule of property in respect of married women in that State; such presumption being one of evidence merely and indulged only in the absence of all evidence to the contrary.

The defendant, however, was in no situation to make such a defense to the action, and the determination of his contention is not necessary.

At the time he borrowed the money, married women were authorized to contract and to bring suits concerning their separate property as if they were unmarried, and this right of separate property has been widened by the act of June 1, 1896. 29 Stat. 193.

Defendant contracted with plaintiff to borrow the money as her separate property, and his note promised to pay her and not her husband. It does not, therefore, lie in his mouth to deny her capacity to sue thereon for his default, for the sole purpose of defeating an action to which he has no defense whatever. Credits for the only payments alleged to have been made have been allowed in full, and he has no pretense of set-off or counterclaim against her husband.

2. We think that the plea of usury was sustained by the plaintiff's own evidence.

It appears that she intrusted \$300 to her husband to be lent to the defendant, and that the rate of interest obtained was the highest that could be lawfully contracted for in the District of Columbia. Comp. Stat. D. C., p. 283. In addition to this, he contracted for a bonus of \$50, to be paid by the defendant for obtaining the loan. Now, had he received this bonus in cash, or taken a separate obligation therefor payable to himself, and had received for the plaintiff a note for \$300 only and delivered the same to her without her knowledge or approval of the exaction for his own exclusive benefit, her right to recover both the principal and interest of her note would not be impaired. *Call v. Palmer*, 116 U. S. 98, 102.

Instead of conducting the affair in the manner aforesaid, he included the bonus in the note with the knowledge and consent of the plaintiff, who promised to pay him the same out of the proceeds of the note when collected. The doctrine established by the weight of authority is this: The note or obligation is affected with usury if the principal makes the loan, knowing that his agent has exacted a bonus or commission, though for his own sole benefit, which, with the interest payable to the principal, would amount to more than the rate permitted by law. 27 A. & E. Encyc. Law, 1006, 1007, and cases cited. See also *Fowler v. Eq. Trust Co.*, 141 U. S. 384, 405.

Under the statute regulating interest and punishing usury, and the rule that prescribes the running of the legal rate after maturity, all that the plaintiff was entitled to recover was the principal sum of \$300, with interest at the legal rate after the termination of the contract rate, less the credits which she had admitted. Comp. Stat. D. C., p. 283, Sec. 3.

As the judgment follows the verdict, which separates the findings for principal and interest as aforesaid, there is no occasion for reversing it and remanding the case for a new trial, provided the appellee will remit the interest as contracted for from date to maturity.

The judgment will, therefore, be affirmed with costs, provided the appellee shall within ten days file with the clerk of this court a remittitur of the aforesaid part of said interest. It is so ordered.

On May 29, 1901, Mr. *Prentiss* for the appellant, filed a motion for a rehearing "upon the question of the effect of usury as to forfeiture of interest and amount recoverable and the question of costs, or for a reconsideration of the condition imposed upon the appellee and the modification of the same so as to require her to enter a remittitur of all the interest, with costs to the appellant." In support of this motion he cited, as to the interest: R. S. D. C., Sec. 715; *Starkweather v. Prince*, 1 MacA. 144; *Sullivan v. Snell*, 1 MacA. 585; R. S. D. C., Secs. 713 and 829; R. S. U. S., Sec. 966;

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Farmers' Bank v. Dearing, 91 U. S. 29; *Brown v. Marion National Bank*, 169 U. S. 416; *Carter v. Carusi*, 112 U. S. 478; *Stockham v. Munson*, 28 Ill. 51; *Bank v. Davis*, 108 Ill. 633; *Bressler v. Harris*, 19 Ill. App. 430; *Payne v. Waterson*, 16 La. An. 239; *Succession of Rhoton*, 34 La. An. 893; *Chaffee v. Heyner*, 31 La. An. 594.

As to the costs, he contended that "Inasmuch as the judgment in the court below carried interest at 10 per cent. for six months and 6 per cent. for six years, amounting to about \$125, if the appellee be required to remit the whole interest the appellant will have been substantially successful on appeal and should be allowed his costs as was done in *Bressler v. Harris*, *supra*, for the appellant could not have appealed from part only of the judgment; or the costs should be divided, as was done in *Denison v. Lewis*, 5 App. D. C. 328, and *Ross v. Fickling*, 11 App. D. C. 442."

On June 7, 1901, the motion for a rehearing was denied, Mr. Justice SHEPARD delivering the opinion of the Court:

The motion for rehearing questions the correctness of the conclusion that only a part of the interest upon the principal sum shall be forfeited on account of usury, and asks for a further modification of the judgment rendered, in that respect. In stating that conclusion, a bare reference was made to the statutes in force in the District regulating the receipt of interest upon and without contract and the practice of assessing the same in an action, as inducing the view that the interest forfeited for usury in the contract was that only to which the contract expressly applied and not that which the law gives in the absence, or upon the expiration, of the contract. However, the question was carefully considered though not discussed in the opinion.

The earnestness and force of the argument and the citation of authority, though not sufficient to cause us to change our conclusion, require a statement of the reasons therefor. Section 713, R. S. D. C., imposes the rate of 6 per cent. interest per annum "upon the *loan or forbearance* of any

money, goods, or things in action." Section 714 makes it lawful to contract or agree in writing for 10 per cent. or any less sum. Section 715 reads as follows: "If any person or corporation shall contract to receive a greater rate of interest than 10 per cent. upon any contract in writing, or 6 per cent. upon any verbal contract, such person or corporation shall forfeit the whole of the interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation."

If there were no other statutory provision relating to interest and its recovery, and no settled rule in regard to its allowance in the rendition of judgment, we should not hesitate to say that section 715 was intended to limit recovery in all cases of usurious contract, to the principal sum therein named only. But it must be considered in the light of other provisions and of established rules in force when it was enacted. Since June 24, 1812, a statute has been in force which declares that 6 per centum per annum shall be awarded on all judgments in actions upon contracts until satisfied, "and the amount which is to bear interest, and the time for which it is to be paid shall be ascertained by the verdict of the jury sworn in the cause." Sec. 829, R. S. D. C.

The practice has always been in this District to direct the jury to assess interest, at the contract rate, to the maturity of the demand, where it is not expressly stipulated to run until paid; and thereafter at the rate established by law. This practice has been expressly affirmed by the Supreme Court of the United States. *Holden v. Trust Co.*, 100 U. S. 72. In that case the note in suit was payable four years from date with 10 per cent interest, payable semi-annually, and it was held, that the contract rate terminated at maturity, and the legal rate of 6 per cent. then began. The court said: "The rule heretofore applied by this court, under the circumstances of this case, has been to give the contract rate up to the maturity of the contract and thereafter the rate prescribed for cases where the parties themselves have fixed no rate. * * * Here the agreement of the parties

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extends no further than to the time fixed for the payment of the principal. As to everything beyond that it is silent. If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation such an amendment cannot be inferred." In a previous case arising under a territorial law, it had been said: "The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract." *Brewster v. Wakefield*, 22 How. 118, 127. See also *Shepherd v. Pepper*, 133 U. S. 626, 653, 654.

Had the note in this case not been rendered usurious by the commission exacted in addition to the maximum rate of interest permitted by law, the verdict would necessarily have been for 10 per cent. interest until maturity, and at the rate of 6 per cent. only for the intervening years. The contract for 10 per cent. would expire with the time fixed for payment, namely, six months after date. Interpreting section 715 in the light of the foregoing doctrine and bearing in mind the familiar rule that forfeitures are not favored and must be plainly required, we think it clear that the forfeiture of the "whole of the interest so contracted to be received," means what it says — the interest of the contract, and not that imposed by the preceding section where there has been no contract, or, as interpreted, where the contract has by its terms ceased to operate.

Nor do the established rules of construction require the forfeiture, thus expressly limited, to be extended by the succeeding words, to the effect that the recovery shall be only the principal sum due. The purpose of these words is fully met, and their reconciliation with those preceding is made complete, by regarding them as intended to remove any pos-

sible doubt that the forfeiture applies not only to the usurious excess but also to the lawful interest included in the contract rate, as long as the contract shall govern. To give a more extended meaning would be to create a forfeiture by an uncertain and unnecessary inference. The law does not vitiate the loan or destroy the obligation to repay the principal on account of the usury. It contents itself with forfeiting all of the interest contracted for, if unpaid, or with permitting its recovery, if paid, by action begun within one year after payment (Sec. 716).

When the interest contract period expires, the penalty ends. The parties still occupy the position of debtor and creditor in respect of the principal of the loan. When the note in this case matured, the defendant could avoid the interest and commission, but remained under legal obligation to pay the principal on that date. It was his duty to pay, and his default entitled the plaintiff to damages. In liquidation of these damages, or by way of compensation for the plaintiff's forbearance of the prosecution of his lawful demand when mature, the statute arbitrarily prescribes a rate of 6 per cent. per annum before and after judgment.

Two decisions of the Supreme Court of the District, in general term, have been cited on the brief as giving an interpretation of section 715 in conflict with the views above expressed. *Starkweather v. Prince*, 1 MacA. 144, and *Sullivan v. Snell*, 1 MacA. 585. The first of these, though relating to the subject of usury, does not touch the question involved. In the second it was said that section 715, in terms, forfeited all interest; but the question was passed with brief mention, and the main consideration was given to other points. The bearing of the settled construction given to sections 713 and 829, upon that of section 715, which we regard as of controlling importance, was not urged or considered.

On the other hand, in a later case in which the usury statutes were again under discussion, though this particular question was not under consideration, the same court, without referring to the former case, expressed its opinion of

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the effect of section 715 as follows: "An agreement for more than legal interest involves the forfeiture of the whole interest. But that means a forfeiture of the whole interest referred to in the agreement." *Brown v. Clark*, 3 Mackey, 185, 188.

Under a statute substantially like our section 715, the Supreme Court of Illinois seems to have held for years that a judgment for no more than the principal sum could be recovered. But the rule seems also to have prevailed that the contract governs the rate of interest after, as well as before maturity in that State. Subsequently, a divided court overruled the former decisions on the express ground that the interest of the contract ended with its maturity (*Bank v. Davis*, 108 Ill. 633), as has always been the settled rule in this District. That decision has itself been overruled. *Bressler v. Harris*, 19 Ill. App. 430; S. C., 119 Ill. 467, 473. As we have heretofore said, if it were not for that settled rule, we would take a like view of the effect of the forfeiture.

But one of the decisions of the Supreme Court of the United States that have been called to our attention, arose in the District. *Carter v. Carusi*, 112 U. S. 478. But that did not involve the construction of section 715, and sheds no light upon it.

Other cases arose under the provisions of the national banking act, which forfeit "*the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon.*" Sec. 5198, R. S.; *Brown v. Marion National Bank*, 169 U. S. 416, and cases cited.

It is to be remarked, however, that in the above case, the court declared the plaintiff entitled to recover the principal of his debt with legal interest from the commencement of the suit. There is nothing in the statute authorizing this recovery of interest, and hence it would seem to rest solely upon the conclusion that the maker of the note, being in default at least from the time of legal demand, must answer in damages therefor. In the District, as we have seen, the statute imposes 6 per cent. by way of damages for the breach

of the contract at maturity, and gives that rate for the creditor's forbearance.

For the reasons given, we must adhere to the conclusion heretofore stated, and decline to modify the judgment pronounced.

The motion is, therefore, *denied*.

LOVE v. STIDHAM.

CONTRACTS; JOINT OBLIGATIONS; QUESTIONS OF FACT FOR JURY.

1. Where partners sell their retail grocery business, with a joint obligation not to enter the same business within a limited area and time, and cease to be partners from the time of sale, it does not require the joint act of both obligors to constitute a breach of the obligation, but its violation by one is a violation by both, for which both are and each is liable to the obligee.
2. In order to show breach of an obligation by the vendors of a retail grocery store and business, not to engage in the same business within a limited area and time, it is not necessary for the vendees to show that the vendors retailed all of the articles that had been kept in and retailed from the store sold to the vendees; but only that a material and substantial part of such articles were retailed and sold by the vendors within the prescribed limits, provided that the business so conducted comes within the definition of a retail grocery business; and the vendors are liable if they serve customers within such limits, although they may have no residence, shop, store or place of business therein.
3. Where the vendors of a retail grocery business and store, from which was sold, among other things, butter, cheese, eggs and poultry, at the time of the sale, covenanted with the vendees not to engage in the retail grocery business within a limited time and area, and the vendees, in an action against the vendors to recover damages for breach of the covenant, show that one of the defendants, since the sale, carried on a business of selling such articles within the prescribed limits, such evidence is of a nature proper to be submitted to the jury upon the question as to whether a breach of the covenant had been committed, and if so, as to the *quantum* of damages; what constitutes a retail grocery business being, to a large extent, a question of fact.

No. 1063. Submitted April 11, 1901. Decided May 23, 1901.

HEARING on an appeal by the plaintiff from a judgment

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of the Supreme Court of the District of Columbia upon the verdict of a jury directed by the court in an action of covenant. *Reversed.*

The Court in its opinion states the case as follows:

This was an action of covenant instituted in the Supreme Court of this District by the appellants, Jesse C. and William Thomas Love, against the appellee, Samuel H. Stidham, and James W. Jones; the said Jones not having been served with process, the action proceeded to trial against the said Stidham alone, and who is the sole appellee in this appeal.

It appears that Stidham and Jones, prior to the 31st day of March, 1896, were engaged in the retail grocery business, at No. 1800 Fourteenth street, northwest, in the city of Washington, District of Columbia, in which business they sold at retail, groceries, provisions, butter, cheese, eggs, poultry, and other articles usually kept in a retail grocery store, and that they conducted said business under the firm name and style of S. H. Stidham & Co. That on the 31st day of March, 1896, they sold out their store to the appellants, with the entire stock of goods on hand, also two horses, wagons, harness and fixtures, together with the good-will of the said business, at and for the sum of \$3,300. The contract was duly executed under the hands and seals of the parties, and the premises were duly delivered to the appellants under and in accordance with the terms of the contract, on the day that the contract was executed. By the contract it was provided, that the party of the first part, that is to say, Stidham and Jones, "shall not enter into the retail grocery business for the period of five years, within one mile of the store building located as herein set forth, and that the said party of the first part hereby assumes all responsibility for the payment of all debts incurred in said business up to and including March 31, A. D. 1896."

There are five counts in the declaration, but they state the

cause of action with but slight variation,—the breaches assigned being substantially the same in all the counts. The breach in the last count is substantially as follows:— That the defendants, Stidham and Jones, in open violation of their said covenant, did, on the 20th of April, 1896, enter into the retail grocery business, to wit, the business of selling at retail, groceries, provisions, butter, cheese, eggs, poultry, meats, vegetables, fruits, marketing, and other articles usually kept and sold in retail grocery stores, within one mile of the store building located as aforesaid, at and in the premises No. 1508 S street, northwest, in the city of Washington, D. C., and at and in and about a certain stall or stand in a certain market house, known as "Riggs Market," situate on P street, northwest, between Fourteenth and Fifteenth streets, in said city, and have or has been so engaged therein thence continually to the present time, whereby a large number, to wit, one hundred persons, who prior to said last-mentioned date were customers of the plaintiffs, having become so by reason of the said purchase by the plaintiffs from the defendants, and who as such customers had been theretofore accustomed to purchase from and deal at the said store of the plaintiffs so purchased by them as aforesaid, large quantities of groceries, provisions, butter, eggs, poultry, meats, vegetables, fruits, marketing, and other articles usually kept and sold in retail grocery stores in said city, have, instead of making such purchases of the plaintiffs, at the store purchased of the defendants, purchased said articles of the defendants at the place or stall in the market aforesaid, in which place or places of business the defendants carried on the retail grocery business, and the business of selling at retail, groceries, provisions, butter, cheese, eggs, poultry, meats, vegetables, fruits, etc., articles usually kept and sold in retail grocery stores in said city, since the time aforesaid, whereby the business and trade of the plaintiffs at the said store, have since the said date, been greatly injured and diminished, and by reason of such breach of said covenant, the plaintiffs have lost a large amount of trade, many customers,

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and large profits, and the property so purchased and paid for by them, and especially said good-will, have been rendered of little value in their hands, and they have thus suffered damage in the sum of \$10,000, for which they bring suit.

To the declaration the defendant Stidham pleaded several pleas, the defendant Jones not appearing. The pleas are as follows:

1. That he, said Stidham, did not jointly with his co-defendant Jones, nor did he individually or severally, covenant, promise, or agree, in manner and form as the plaintiffs have alleged.

2. That the defendant Stidham did not, with defendant Jones, nor did he individually or severally, at any time since the 31st day of March, 1896, enter into the retail grocery business within one mile of premises No. 1800 Fourteenth street, northwest, in said city of Washington, in manner and form as alleged.

3. That he did not with said Jones, nor did he individually or severally, on the 20th of April, 1896, or at any time since the 31st day of March, 1896, enter into the business of selling at retail butter, eggs or poultry, being a branch of the retail grocery business, and being also a branch or portion of the business which the defendants had sold to the plaintiffs, and in which the defendants had been engaged prior to the 31st day of March, 1896, etc., as alleged in the third count of the plaintiff's declaration, in manner and form as alleged.

4. That the defendant Stidham did not with said Jones, nor did he individually or severally, on the 20th of April, 1896, or at any time since the 31st day of March, 1896, enter into the business of selling at retail butter, eggs, poultry, cheese, meats, vegetables, marketing or provisions, being a branch of the business which the defendants sold to the plaintiffs, in manner and form as alleged in the fourth count of the plaintiffs' declaration.

5. The fifth plea is of former judgment recovered in favor of the defendant Stidham, in an action on the covenant sued

on in this case; but there was no evidence offered, so far as the present record discloses, in support of that plea, and it must, therefore, be treated as wholly immaterial upon this appeal.

Issue was joined upon all the pleas; and upon the trial it was shown in proof, that the defendant Stidham, after the sale of the store and good-will of the business at No. 1800 Fourteenth street, northwest, carried on a business of selling butter, eggs, poultry, and cheese, and that such business was carried on and conducted by said Stidham at stand No. 8 "Riggs Market;" and that the plaintiffs lost a considerable number of their customers by reason of said defendant carrying on said business. The plaintiffs gave in evidence two business cards of the defendant Stidham. The first of which is as follows: "S. H. Stidham, dealer in finest grades of Elgin butter, and strictly fresh eggs. Residence: 1508 S Street, N. W. Stand: No. 8, Riggs Market."

The second card is as follows: "S. H. Stidham, poultry dealer. Dressed poultry a specialty. Residence: 1508 S Street, N. W. Stand: No. 8 Riggs Market."

The plaintiffs offered evidence further to prove, that at the time of the sale of the store and good-will of the business to them the defendant had about seventy-five regular customers who dealt with the plaintiffs for a time after the sale; that very soon thereafter the plaintiffs' said customers began to drop off, and that the majority of said former customers of Stidham & Co. quit dealing with the plaintiffs from time to time, off and on; that the witness knew and could name about thirty-nine regular customers of said Stidham & Co. who dealt wholly with the plaintiffs for a time after the sale, but who entirely stopped dealing with the plaintiffs; that the business comprised dry groceries and green groceries, including butter, eggs, cheese, and poultry. That Stidham, after the sale to the plaintiffs, sold butter, eggs, and poultry from his wagon to certain customers named; that witness saw him at several places delivering goods from his wagon and that he had butter, eggs, cheese, and poultry in it. That the distance of the "Riggs Market" from the

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plaintiffs' store is three squares, and that of No. 1508 S street, northwest, is one and a half squares.

The witness, on cross-examination, testified that he never knew the defendant Jones to engage in business after the sale to the plaintiffs; that the customers who left the plaintiffs discontinued all purchases from them; that he had never known Stidham to sell sugar, coffee, meats, or any other articles than butter, eggs, cheese and poultry, after the sale of the store and good-will to the plaintiffs.

Upon the evidence offered by the plaintiffs, the defendant moved the court to instruct the jury to return a verdict for the defendant, and that instruction was given and the verdict returned for the defendant accordingly. The judgment was entered thereon and the plaintiffs have appealed.

Mr. Thomas M. Fields, Messrs. Douglass & Douglass and Mr. Jean F. P. Des Garennnes for the appellants.

Mr. J. J. Darlington and Mr. Joseph D. Wright for the appellees:

1. It is a well-settled rule of law that where two or more persons make a contract, without any words of severance whatever, the instrument is joint only; and it is submitted that the contract of a partnership forms no exception to this rule. 1 Add. on Contr. 38; 1 Pars. on Contr. 11.

2. But it is contended by the appellants that, even though this be true, yet, inasmuch as the covenant in the case at bar is one made by a partnership, the general rule does not apply. This is not true. Lindley on Partn., Secs. 365-6. See also *Crosby v. Jerolman*, 37 Ind. 265, 273.

The covenant in this case is made in terms and is signed by the partnership, and the whole subject-matter of the contract, relating to the things to be done and avoided, pertains to the acts which the partnership, as such, agrees it will, or will not, do. The clause agreeing not to engage in the retail grocery business is joint, and is an undertaking by the firm that it, as such, will not engage in such business, and not that

the individual members separately shall not so engage. There was no proof whatever at the trial, nor was it claimed here, that the partnership of Stidham & Company, acting as a firm, had ever engaged in the retail grocery business in breach of its agreement. Yet this was the only issue in the pleadings at the trial, and the issue upon which the action of the court below, in directing a verdict, must stand or fall in this court.

In each of the five counts of the declaration, an express joint covenant is set up, and, as a breach thereof, it is alleged that the *defendants* did enter the retail grocery business. The testimony shows that the defendant Stidham, alone sold butter, eggs, cheese and poultry as a stall dealer in the Riggs Market, sales from his wagon not being claimed in the testimony to have been made within the mile limit, and if they could be claimed to have been a violation of the contract, which is denied.

3. It is insisted that, if it be true, as the appellants contend, that the acts of Stidham, individually, would bind the firm, yet, the plaintiffs having declared that both the defendants engaged in the prescribed business, any evidence short of proof that both Jones and Stidham did the forbidden thing did not sustain the case laid in the declaration, and the only one upon which the court below could rule. Nor can it be claimed that there was any surprise to the plaintiff. They amended their declaration for the very purpose of making the issue what it is, and they made no application, after their proofs were in, to further amend.

4. The appellants claim that the court below should have left it to the jury to say whether or not the sales by Stidham constitute entering into the retail grocery business within the meaning of the contract; but the attention of the court is respectfully directed to the fact that the plaintiffs rested their case without offering a single word of evidence to go to the jury on the meaning of that term as understood in the trade or otherwise. They cannot, then, insist that the court should have submitted this question to the jury under an issue which wholly failed of support in the testimony, even

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if there had been such proof. In *Eastman v. Chicago*, 79 Ill. 178, it is held that ordinary retail booksellers are not "dealers in second-hand goods," under an ordinance requiring a license for such dealers, because, in connection with the business, and as incidental thereto, they buy and sell second-hand books. In *Shiels v. Great Northern R. Co.*, 30 L. J. Q. B. 331, it is held a railroad company does not carry on business in a certain place within the meaning of a statute defining the locality of jurisdiction over it, merely because it has a station there by which passengers and freight are received and contracts therefor made.

5. In the cases of *Western District Warehouse Company v. Hobson*, 96 Ky. 550; *Boutelle v. Smith*, 116 Mass. 111; and *Stark v. Noble*, 24 Iowa, 71, the contracts contained express words of severalty, such as "that they will not or either of them," etc (*Boutelle v. Smith, supra*); "the firm of H. H. Hobson & Co., or as individuals" (*Warehouse Company v. Hobson, supra*); and to the same effect was the contract in *Stark v. Noble*. As will be seen by reference to the license acts of the District of Columbia, dealers in butter and cheese, poultry and eggs, are denominated "dealers in farmers' produce."

Mr. Chief Justice ALVEY delivered the opinion of the Court:

The specific ground upon which the ruling of the court below was founded is not stated in the bill of exception; but it seems to be conceded by both sides that the view upon which the court acted in withdrawing the case from the jury was, that the covenant sued on was not broken by the acts and conduct of Stidham alone; that as the covenant in terms was joint, and provided only against the joint acts of both Stidham and Jones, to entitle the plaintiffs to recover it was incumbent upon them to show that the breach complained of was committed by the joint act or acts of both Stidham and Jones; and without evidence to that effect no recovery could be had against Stidham for acts committed by him alone.

That is to say, the acts of one are not to be construed as the acts of both under the covenant. Whether this is the proper construction of the covenant, is the first and principal question in the case.

There can be no question but that the covenant sued on is, by its terms, a joint covenant, and not joint and several. But does it follow that it requires the *joint act* of both defendants in order to constitute a breach of this covenant? A joint covenant does not necessarily mean a joint act to incur liability under it. The covenant is negative in form, that is to say, that *the party* of the first part "shall not enter into the retail grocery business for the period of five years, within one mile," etc. The covenant is not "that the party" shall not as partners, and only as partners, enter into the retail grocery business, but they jointly obligate themselves that they will not enter into such business. They ceased to be partners from the time of selling out their business to the plaintiffs. To say that there could be no violation of the covenant except by the joint acts of the defendants as and in their character of partners, would seem at once to deprive the plaintiffs of all substantial benefit and protection of the covenant, by reason of the easy manner in which it could be evaded. If such be the construction of the covenant, both Stidham and Jones, acting separately and individually, could each establish a place for carrying on the grocery business, within a block of the plaintiffs' store, with entire impunity. Such could never have been the intention of the parties. The violation of the spirit and substantial meaning of the covenant by one of the defendants is a violation by both, and for which both are liable. The authorities seem to be clear to the effect, that any number of persons may bind themselves *jointly* for the performance of one entire duty, and so become sureties for one another for the performance of the thing contracted to be done. 1 Wms. Saund. 291b, note 4; 1 Add. on Contr. 38, 39. The substance of the covenant ought not to be sacrificed to a dry technicality without reason, as would certainly be the case, if one, or both of the defendants separately, could do what the defend-

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ant Stidham has done, without incurring liability under the covenant.

There are decided cases that fully support the contention of the plaintiffs. The case of *Kramer v. Old*, 119 N. C. 1, was where there was a sale of a mill by partners, and the joint stipulation on their part was "that they would not continue business of milling in the vicinity of Elizabeth City after the first day of September, 1891, and the full completion of the agreement." In that case it was held to be a violation of the contract for any one, or all of the vendors to take stock in, help to organize, or manage a corporation formed to compete with the purchaser of the mill in such business. It was also held to be a violation of the contract for the prohibited parties to furnish machinery or capital, or a portion of either, in lieu of stock, in a corporation organized with a view of competing with the person protected by his contract against such injury. The court in that case proceeded upon the ground that a reasonable and fair construction of the restrictive stipulation fully warranted the judgment against the defendants.

In the case of *Boutelle v. Smith*, 116 Mass. 111, a firm of two bakers sold their business and good-will to another firm, with an obligation that they would not enter into the business within a limited area and time. One of the vendors engaged as a clerk with a third person having his store or place of business outside of the limited area, but such clerk drove a wagon over his former routes and sold and delivered bread to his former customers. This was held to constitute a breach of the contract and to render both vendors liable for the acts of the one. The court, speaking by Mr. Chief Justice Gray, said: "The acts of one of the defendants offered to be proved at the trial, were a clear breach of their joint obligation;" citing case of *Angier v. Webber*, 14 Allen, 211.

The case of *Warehouse Co. v. Hobson*, 96 Ky. 550, was a suit instituted against Hobson and others for damages, and to restrain Hobson from carrying on the tobacco business in Paducah or in that vicinity, in violation of a stipulation in

restraint of such business. The bill of sale of Hobson & Co., by which they disposed of their warehouse business, contained this provision: "And also all our good-will in said warehouse business as members of the firm of H. H. Hobson & Co., or as individuals; and we agree with said company not to engage in said business, directly or indirectly, for a period of ten years from this date." This provision of the contract of sale was violated by the individual acts of Hobson alone. The Court of Appeals held that the plaintiff was entitled to redress for such violation of the contract of sale, and in their opinion stated the case as follows:

"It appears that appellees were owners of a tobacco warehouse in Paducah, and had built up quite a large trade in that vicinity. Some time prior to March 14, 1892, the appellant purchased the property and good-will of the appellees, and also, as alleged, contracted and agreed with them that they, the appellees, would not enter into said business directly or indirectly for ten years. Appellees executed deed of conveyance to appellant for said property, but afterwards appellee Hobson engaged in the same business, in the city of Paducah, and within less than five years from the sale." For this violation of the contract by the acts of Hobson alone, his co-contractors and obligors were held liable. See also the case of *Stark v. Noble*, 24 Iowa, 71, where the same principle is maintained.

It is urged on behalf of the defendant Stidham, that the cases of *Boutelle v. Smith*, and *Warehouse Co. v. Hobson*, do not apply to this case, because they were cases where the contract was both joint and several. But whether that be the case or not is wholly immaterial in the application of those cases to the present. In those cases the court enforced the *joint obligation* of the parties, for the separate violation by one of them, treating all as equally and jointly bound for breaches committed by one or more of them, by virtue of the joint term in the contract.

2. The validity of the covenant sued on is not questioned, and could not be, upon the settled doctrine upon the subject as laid down by the Supreme Court, in the case of *Gibbs v.*

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The Baltimore Gas Co., 130 U. S. 396, 409. That being so, the only remaining question is, whether the facts of the case as proved by the plaintiffs were sufficient to require the case to be submitted to the jury for their consideration, to establish a breach of the covenant. Did the defendants or either of them enter into the retail grocery business, within the time and area prescribed? To answer this question in the affirmative it does not require that it be shown that the defendant had a regular store, or that he retailed all the articles that had been kept and retailed from the store sold to the plaintiffs. If a material and substantial part of such articles were retailed and sold by the defendant within the prescribed limits, that would constitute a breach of the covenant, provided it comes within the definition of a retail grocery business. The defendant is responsible if he served customers within the prescribed limits, although he might have no residence, shop or place of business within such limits. *Turner v. Evans*, 2 El. & Bl. 512; *Brampton v. Beddoes*, 13 C. B. (N. S.) 538. He must, however, have entered into and carried on a retail grocery business. What constitutes a retail grocery business is, to a large extent, a matter of fact, and must be determined by a jury, under proper instructions from the court, as to the meaning and construction of the contract. We think the evidence in this case was of a nature proper to have been submitted to the jury upon the question as to whether a breach of the covenant had been committed, and if a breach had been found to have been committed, as to the *quantum* of damages.

Upon the whole, we think there was error in the ruling of the court below, in taking the case from the jury, and we must, therefore, reverse the judgment and remand the case for a new trial; and it is so ordered. *Judgment reversed and cause remanded.*

A motion for a rehearing was overruled.

FEDARWISCH v. ALSOP.

EQUITY; CREDITOR'S BILLS; SET-OFF; DISMISSAL OF ACTION FOR WANT
OF PROSECUTION, EFFECT OF.

A creditor having a claim *ex contractu* against another, not reduced to judgment, may maintain a bill in equity to set off such claim against a judgment on a claim *ex delicto* recovered against him by such other person, if the latter is insolvent; and equitable relief under such circumstances is not precluded where, at the time of the filing of such a bill, complainant has an action at law pending to enforce his claim, and, during the pendency of the equity proceedings, the action at law is dismissed for want of prosecution, such dismissal not constituting an adjudication of the claim so as to prevent further litigation of it; *distinguishing* Droop v. Ridenour, 9 App. D. C. 95.

No. 1065. Submitted April 12, 1901. Decided May 22, 1901.

HEARING on an appeal by the complainant from a decree of the Supreme Court of the District of Columbia, sustaining a demurrer to and dismissing a bill in equity to set off a claim *ex contractu* against a judgment obtained by the defendant against the complainant on a claim *ex delicto*. *Reversed*.

The COURT in its opinion stated the case as follows:

This is an appeal from a decree of the Supreme Court of the District of Columbia dismissing a bill of complaint filed for the purpose of procuring a set-off.

On April 9, 1897, the appellee, Thaddeus Alsop, as plaintiff in a suit at common law in the Supreme Court of the District, recovered judgment for the sum of \$150 against the appellant, Kunigunda Fedarwisch, who is his mother-in-law, on account of an assault and battery committed upon

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him by the appellant and two other persons. At the time of the rendition of this judgment, there was pending in the same court another suit at common law instituted by the appellant as plaintiff against the appellee as defendant to recover the sum of \$366.67 on account of various matters of contract. This latter suit was instituted after the appellee's suit against the appellant. Being the first to prosecute his suit to judgment, the appellee, it seems, threatened to issue execution. Thereupon the appellant instituted the present proceeding by filing her bill in equity to enjoin the appellee from proceeding.

In this bill, after the statement of the counterclaims of the parties, their nature and condition, the appellant alleged her own solvency and the possession of ample estate out of which the appellee's judgment could be satisfied, and on the other hand the utter insolvency of the appellee, and that he had no property, real or personal, from which any judgment against him could be satisfied. And the prayer of the bill was that the complainant's claim should be decreed to be a set-off against the defendant's judgment; that the judgment should be decreed to be satisfied; that the defendant should be enjoined from executing it; that an accounting should be had; that the complainant should have a decree for any balance that might be found due to her, and for general relief.

Upon this bill there was a temporary restraining order issued. Subsequently the appellee filed his answer, and there was joinder of issue.

At this stage of the proceedings, the attorneys of the appellee intervened with a petition that they had a lien on the appellee's judgment for their fees, amounting to \$95, which was superior to the appellant's equity, and asking that the appellant should be required to pay this amount, on penalty of the dissolution of the restraining order in the event of nonpayment. Their claim seems to have been allowed; for they received and receipted for the money, which was paid to them by the appellant.

Both the appellant's suit at law against the appellee and this present proceeding in equity seem then to have been permitted to slumber for some time.

By a stipulation filed in this cause it appears that the suit at law was commenced on March 31, 1897; that the appellee filed twelve pleas thereto, including plea of the general issue and the statute of limitations; that to the plea of the statute of limitations there was a replication of a new promise; that ultimately, on May 1, 1897, issues were joined; that on May 4, 1897, the cause was duly calendared for trial; that on December 21, 1898, the cause was sent to the "stet" docket of the court under a rule which provided for such action when a cause remained on the trial calendar for several successive terms without being actually brought to trial; and that, having remained on the "stet" docket for upwards of a certain specified period of time without any action looking towards a disposition of it, it was, on February 3, 1900, at the instance of the defendant, the appellee here, dismissed in the clerk's office, by the clerk, acting under authority of a rule so authorizing him to do, but which was done without any notice to the plaintiff in the suit.

It was not, however, until several months afterwards, on November 2, 1900, that any further action was taken by either party, so far as the record before us shows. On this last-mentioned day a stipulation was filed, entered into by the parties through their respective attorneys or solicitors, whereby it was agreed that the appellee should withdraw his answer and interpose a general demurrer to the bill; that the proceedings in the law cause to its conclusion, as above narrated, should be considered by the court as facts in the case; and that, if the demurrer should be overruled, the complainant should have final decree, as prayed; but that, if the demurrer should be sustained, the bill should be dismissed.

Upon the bill of complaint, the demurrer thereto and this stipulation, the cause was heard. The court below sustained the demurrer, and dismissed the bill; and from the decree of dismissal the present appeal has been prosecuted.

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Argument of Counsel.

Mr. Thomas M. Fields for the appellant.

Mr. Charles A. Douglass, Mr. E. S. Douglass and Mr. Levi H. David for the appellee:

1. Complainant having alleged in her bill that, prior to the filing of said complaint, a suit at law had been commenced, "*which suit is still pending*," this was the inducing cause which prompted the court to grant the restraining order enjoining the defendant (appellee) from enforcing the collection of his judgment in law cause 40,238 (assault and battery case) "until the further order of the court." The restraining order was passed for the purpose of enjoining defendant from proceeding by execution in law cause No. 40,238, and to await the determination of law cause No. 40,895. We submit that the case of *Droop v. Ridenour*, 9 App. D. C. 95, is absolutely decisive of this case.

2. It is to be noted in this case the complainant does not allege fraud or that defendant is a nonresident, or that service cannot be obtained upon him, or that there is any fund within the control of a court of equity, concerning which complainant has a lien upon or interest in. Judgment is necessary to establish the measure of the demand of the complainant for which he seeks satisfaction in chancery." *Smith v. Railroad*, 95 U. S. 398. See also *Oakley v. Pound*, 14 N. J. Eq. 178; *Case v. Bauregard*, 101 U. S. 68; *Hatch v. Dana*, 101 U. S. 205. The mere fact that the debtor is insolvent or in failing circumstances is not sufficient. *Lawson v. Grubbs*, 44 Ga. 466; *Hall v. Joiner*, 1 S. C. 186; *Monroe v. Cutter*, 9 Dana (Ky.), 93. Due regard being had to the condition of the record, can it not be said that the appellee was and is entitled to a trial by jury as guaranteed by the Seventh Amendment to the Constitution? *Cates v. Allen*, 149 U. S. 451; *Scott v. Neeley*, 140 U. S. 106. This right is not always satisfied by issues sent out of chancery. *Whitehead v. Shattuck*, 138 U. S. 146; *Buzard v. Houston*, 119 U. S. 347; *Hess v. Horton*, 2 App. Cas. D. C. 81.

Mr. Justice MORRIS delivered the opinion of the Court:

There is no opinion of the court filed in the case or to be found in the record; and we are not specifically advised of the grounds upon which its decision was based. But whatever those grounds may have been, it is very clear to us that, under the authority of the case of *North Chicago Rolling Mill Company v. St. Louis Ore and Steel Company*, 152 U. S. 596, the decree appealed from must be reversed. In that case, under a condition of things not substantially different from the condition here, it was held that "cross-demands and counterclaims, whether arising out of the same or wholly disconnected transactions, and whether liquidated or unliquidated, may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice." And again it was said in the same case: "It is well established that equity will entertain jurisdiction and afford relief against the collection of a judgment where in justice and good conscience it ought not to be enforced, as where there is a meritorious equitable defense thereto, which could not have been set up at law, or which the party was, without fault or negligence, prevented from interposing."

And again in the same case the Supreme Court said: "By the decided weight of authority it is settled that the insolvency of the party against whom the set-off is claimed is a sufficient ground for equitable interference."

This case definitely establishes the proposition of law for us, that a creditor, having unliquidated demands against another not reduced to judgment, may set them off in equity against a judgment recovered against him by that other person, if there has been no opportunity to set them off in the suit which led to the judgment, and if the person who holds the judgment is insolvent. That is precisely the condition here; and the decision of our tribunal of last resort renders unnecessary any further discussion of the question.

The argument on behalf of the appellee, however, seems to assume that some different rule should prevail in the pres-

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ent case, because it was shown by the bill of complaint and the stipulation between the parties, that at the time of the filing of the bill in equity, there was a suit at common law pending wherein the claim of the complainant was involved, and that this suit was abandoned by the complainant.

The abandonment of that suit by the complainant and its dismissal for failure of prosecution, as is well established by all the authorities, do not constitute an adjudication of the claim such as to preclude the party from further litigation of it. To permit it to be dismissed for want of prosecution is no more than a voluntary dismissal. Neither one is the equivalent of a judgment on the merits. If the plaintiff in that suit at law had proceeded therein to a final determination on the merits and there had been final judgment against her, it might well be that a court of equity if it still retained the bill for an injunction would thereupon dissolve the injunction and dismiss the bill. But there was no obligation on the plaintiff to proceed with that suit at law. She might have dismissed it voluntarily after she had filed her bill in equity and left the whole controversy thereafter to the arbitrament of equity. That she abandoned it and made no further attempt to prosecute it can make no difference. Dismissal of the suit, voluntary or involuntary on her part, leaves the question of the merits of the claim wholly undetermined, precisely as though no suit had ever been instituted. A cause for the cognizance of a court of equity arose, when the appellee had procured his judgment and his insolvency was apparent and appellant had outstanding claims which she could not have introduced into the appellee's suit against her on account of her claims being *ex contractu*, while his claim was one *ex delicto*. When this cause for the intervention of equity arose, there was no longer any necessity for the prosecution of the suit at common law; and when the bill of complaint was filed in equity the court of equity acquired jurisdiction to determine the whole controversy, and all the issues between the parties. The court of equity was not restricted to action ancillary to that of the court of common law. This is well-established and fundamental doctrine and needs no citation of authorities in support of it.

It is argued on behalf of the appellee that the case of *Droop v. Ridenour*, 9 App. D. C. 95, establishes a somewhat different doctrine, and that the appellant is not entitled to deprive the appellee of his right to a trial by jury by going into a court of equity. This argument might have greater plausibility if the appellee himself had not been the active agent in the dismissal of the appellant's suit at law, or if that suit were still pending. But what was said in the case cited is entirely true in the present case also, and antagonistic to the appellee's position. It was said:

"If, therefore, a judgment at law could be obtained, it could not be executed by legal process against the equitable interest of the defendant in the property sought to be reached by this proceeding; and the ultimate resort, after all, would be to a court of equity. The only objection that the defendant can urge is, that the claim has not been reduced to judgment upon trial by jury, or that he has not had the benefit of trial by jury in the establishment of the claim. But a right to trial by jury is not so absolute as that it may be rightfully insisted upon under all circumstances. *Barton v. Barbour*, 104 U. S. 126. It is by the conduct of the defendant himself that he may elect to forego the right of trial by jury." *Droop v. Ridenour*, 9 App. D. C. 95, 108.

So, in the present case, if the plaintiff in the lawsuit had succeeded in obtaining judgment in her favor upon her claim, she would still have been under the necessity of recurring to the court of equity to set off the one judgment against the other; and it was the action of the appellee in attempting to enforce his own judgment by execution before the appellant had opportunity to procure an adjudication of her claim at common law, coupled with the conceded fact of the utter insolvency of the appellee, which compelled the appellant to have recourse to a court of equity. It is said that he was clamorous for a trial of his liability by a jury; but, if he was, he certainly resorted to a remarkable method for the manifestation of his desire.

But it is said further in the case of *Droop v. Ridenour*, just cited:

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"It is by the conduct of the defendant himself that he may elect to forego the right of trial by jury; for he may enjoy the right of such trial, if he thinks proper to appear to the pending action at law, and submits to the trial of that case. Upon entering his appearance to that action, he will be entitled to a stay of this proceeding to await the result of the action at law; and if that action be determined against the plaintiffs therein, it will end the present proceeding. But if no such appearance be entered by the defendant, the complainants will be entitled to proceed in this suit."

And it seems to be inferred from this that in the present case the appellant was compellable to proceed with her suit at common law, and could not proceed with the equitable proceeding until the common-law suit was decided. In fact, the inference would seem to be that the whole purpose of the equity suit was simply to maintain the existing status of things until a decision would be had in the suit at common law. But this is plainly an error, and a misapprehension of the scope of the decision in the case of *Droop v. Ridenour*.

That was a case where a creditor, whose claim had not been reduced to judgment, but who had instituted suit therefor at common law against the debtor, who had absconded from the jurisdiction for the purpose of evading his creditors, and upon whom, therefore, no service of process had been or could be had, filed a bill in equity against such absconding debtor to subject an equitable interest of the debtor to the payment of the debt, when the debtor had no other property in the jurisdiction out of which the debt could be satisfied by proceedings at law. There the absconding of the debtor from the jurisdiction, coupled with the fact that there was nothing but an equitable interest which could be reached in satisfaction of the claim, is the circumstance which justified recourse to a court of equity. And in the case heretofore cited of *North Chicago Rolling Mill Company v. St. Louis Ore and Steel Company*, 152 U. S. 596, nonresidence in such cases was held to justify the intervention of a court of equity, as well as insolvency. But nonresidence is a circumstance over which the defendant always has complete control. By en-

tering an appearance to a suit at common law he may remove and obviate the necessity of a recourse to equity by a plaintiff. Moreover, when there are two suits pending which involve the same subject-matter, one at common law and one in equity, it is familiar law that a defendant may have a stay of proceedings in the one until the other is determined. But such a stay of proceeding, if it is had, does not deprive a plaintiff of the control of his own suit, or of the right to dismiss it, or to permit it to be dismissed, if he thinks proper. Plainly the right to such a stay of proceeding does not mean that a plaintiff must proceed at common law rather than in equity when he has the right to proceed in either; but it means that he should not vex a defendant with two concurrent suits in reference to the same subject-matter.

Under the authorities cited, it necessarily follows that the decree appealed from must be *reversed, with costs. The cause will be remanded to the Supreme Court of the District of Columbia, with directions to vacate the said decree, to overrule the demurrer interposed in the case, and to enter a decree in favor of the complainant in the cause, the appellant here, in accordance with the terms of the stipulation between the parties. And it is so ordered.*

WOOLARD v. WOOLARD.

HUSBAND AND WIFE; DIVORCE: DESEOTION.

1. To convert the continuation by the wife of a voluntary separation had upon the demand of the husband, who refused longer to live with her upon her confession that she no longer loved him but was willing to remain with him "for appearance sake," into the willful desertion and abandonment for which under the statute an absolute divorce may be granted, it is at least incumbent on the husband to show that he has, in a conciliatory manner and in perfect good faith, invited her return without condition.
2. Where shortly after a husband and wife separate upon his demand, the husband writes to his wife and in cold and formal terms invites

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her to return and resume her full duty as his wife, together with the love she should have for him, with no assurance of continued affection on his part, or indication of regret that he had insisted upon their separation, the general tone of the letter being one of complaint and containing a reproach for which there is no foundation in the evidence as to the causes of the separation, and the wife does not return, the husband will not be entitled to a divorce for desertion.

3. A decree in such a case dismissing the bill of complaint, modified so as to show a dismissal without prejudice, and, as modified, affirmed.

No. 1072, Submitted April 12, 1901. Decided May 22, 1901.

HEARING on an appeal by the complainant from a decree of the Supreme Court of the District of Columbia dismissing a bill of complaint for a divorce on the ground of desertion, filed by a husband. *Modified and affirmed.*

The facts are sufficiently stated in the opinion.

Mr. E. Hilton Jackson for the appellant.

There was no appearance for the appellee.

Mr. Justice SHEPARD delivered the opinion of the Court:

The appellant, William F. Woolard, appeals from a decree dismissing his bill for divorce filed against his wife, Clara C. Woolard, November 23, 1900.

The bill alleges marriage of the parties in the District of Columbia on November 18, 1890, and cohabitation as man and wife until July 30, 1898; and willful desertion by defendant on September 3, 1898, more than two years before the institution of the suit. Defendant, though duly served with process, made no appearance in the court below, and has not entered appearance in this court.

The testimony taken on behalf of the plaintiff shows the marriage as alleged, and the necessary jurisdictional facts of residence.

Reverend Lucien Clark, pastor of Foundry Church, in Washington, of which both parties were members, testified

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that plaintiff came to him in July or August, 1898, and "revealed the fact that there was incompatibility between the two, and that he had endured it as long as he could, and that they would separate;" that he "inquired diligently to learn if there were any possibility of a reconciliation, and received the impression that it was impossible." He further stated that the defendant also came to see him later and "expressed a desire to continue to live with Mr. Woolard for appearance sake, but said emphatically that if they separated she would never return to him; the separation had been determined upon before that, but they had not separated; they were living in the same building and in the same room." Plaintiff also told him that "she had said to him that she did not love him, and he said he could not live with a woman who positively declared that she did not love him and persisted in that declaration." * * * "He said that he was willing at any time, if she would return to him and love him and live with him as a wife, to receive her as such." Upon inquiry made by witness of the defendant if she had any charges to make against plaintiff before the church, she said: "No, and if there were a church trial, or a trial in court she never would appear." This voluntary separation seems to have occurred about August 1, 1898.

Plaintiff then wrote defendant the following letter:

"AUGUST 31, 1898.

"DEAR CLARA: I herewith send you \$30, the promised monthly allowance for your necessities, for September, but feel that I ought to be relieved from even this expense by your immediate return to me and the resumption of your full duties as my wife, together with the love which you should have for me. I am living at Tenleytown and find the cost very moderate in comparison with what we have been used to. We can find a small house out here, which will be suitable for our needs and in which we can live in accordance with our means. It is simply nonsense for us to have lived in such an expensive style, and I consider a change to this location imperative, for I am not willing to further undertake

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the maintenance of a family in the city, where the cost of living is so high. For a long time in the past our expenses exceeded my income, and I must economize hereafter. Then, again, we shall not be afflicted with any more of your peculiar and unnatural friendships, which have robbed me of your love and broken up my home. Sincerely yours,

“W. F. WOOLARD.”

This letter, of which a copy attested by a witness was retained, was sent by registered mail. Copies of similar letters were offered in evidence, bearing date September 30 and October 31, 1898.

Plaintiff continued to send defendant \$30 per month by checks which she collected without acknowledging the receipt of his letters.

The next letter bears date May 31, 1900. In this he referred to her statement, once made, that she would receive no contribution from him, to the fact that he had sent her in all \$690 without receipt of acknowledgment, and to her failure to take any notice of injuries that had caused his detention in the hospital. The conclusion of this letter was in the following words:

“More than a year ago I wrote you two or three times, stating that I was willing to receive you back, establishing our home anew. To these letters you made no reply, and I assumed then as I assume now that you have no intention of returning to me. I now renew this offer and ask that you come back and occupy the relations which you formerly held as my wife; in which event I will provide liberally for you as I always have done, such provision being limited only by my means. In the event you persist in the determination formed so long ago not to return to me, I feel that I will then be neither morally nor legally bound to continue my remittances toward your support. These remittances will cease with the present enclosure unless you see fit to accept the invitation contained in this letter.

“Yours, truly,

“W. F. WOOLARD.”

On July 2, 1900, he wrote again, saying no reply had been received, and added: "The offer made then is still open to you. Meanwhile, I inclose \$30 for the present month."

This appears to have been the last communication, as well as the last remittance.

We agree with the learned justice who rendered the decree that the proof in this case fails to make out a case under the statute which provides that a divorce may be granted "for willful desertion and abandonment by the party complained of against the party complaining for the full uninterrupted space of two years."

It appears from the testimony of the minister, in whom both parties confided, that the separation took place upon the plaintiff's demand. He refused longer to live with a wife who confessed that she no longer loved him. She was willing to remain with him "for appearance sake."

To convert her continuation of this voluntary separation into the statutory desertion, it was, at the very least, incumbent upon him to show that he had, in a conciliatory manner and perfect good faith, invited her return without condition. This proof has not been made.

Notwithstanding the terms of the first letter written to the defendant and the precaution taken to copy it and insure positive proof of its delivery, it would probably be too harsh to say, in the light of some explanatory statements of friends in whom the plaintiff confided, that this letter was not an attempt, in good faith, to bring about reconciliation, but rather to lay the foundation for a bill of divorce after the expiration of two years. At the same time, it is quite clear to our apprehension that the defendant's failure to acknowledge the receipt of the letter and to accept the invitation as given did not amount to the "willful desertion and abandonment" of the statute.

The invitation was cold, formal and upon condition. Demanding her return and the resumption of her "full duty" as his wife, "together with the love which she should have" for him, there was no assurance of continued affection on his part, or indication of regret that he had insisted upon

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their separation. Moreover the general tone of the letter is one of complaint, and the last sentence is in the nature of a reproach for which there is no foundation in the evidence respecting the causes of the separation that had taken place. That the defendant did not accept such an invitation, following so speedily after the plaintiff's withdrawal, is not to be wondered at.

The second letter, though not so objectionable, was not a great improvement upon the first. It is unnecessary to consider the later letters, for if their sufficiency for the purpose were conceded, the necessary two years had not elapsed before the institution of the suit.

The conditions surrounding the later married life of these parties, who have no offspring, and the circumstances of their separation, are singular, and it may possibly be that the plaintiff has greater grievance and more excuse for his own conduct than has been made to appear in the evidence.

For these reasons, and at his request, the decree, instead of being affirmed outright, will be *modified so as to show a dismissal of his bill without prejudice. So modified, the decree will be affirmed, with costs.*

[The plaintiff subsequently, by leave of the lower court, filed an amended petition, took testimony thereon and, after hearing, was granted an absolute divorce from the defendant.—REPORTER.]

CHAMBERLAIN v. EDMONDS.

PLEADING AND PRACTICE; PARTIES; CERTIORARI; JUSTICES OF THE PEACE;
JURY TRIALS.

1. The justice of the peace is properly the sole respondent, and alone is competent to make a return, to a writ of *certiorari* issued to compel him to bring up to the Supreme Court of this District his record in a cause in which the petitioner for the writ claims he has acted or is acting without jurisdiction, and it is improper to make a party to the cause a party respondent to the petition for the writ.
2. While affidavits may properly be incorporated into a petition for a writ of *certiorari* from a superior to an inferior tribunal, or made part thereof, and may similarly be annexed to a return, independent affidavits which constitute no part of either the petition or the return, are improper in such proceedings, and when filed will not be considered.
3. When a jury empaneled on demand of the defendant in a justice of the peace case, fail to agree, it is the duty of the justice to discharge them, and the effect of such disagreement and discharge is not to terminate the cause and oust the jurisdiction of the justice, but to remit the parties to the position they held before the jury was empaneled.
4. Failure by a justice of the peace to continue a cause to a day certain after a jury empaneled therein have disagreed and been discharged, will not operate to discontinue the cause, but either party may then at any time, upon motion and notice, call it up for trial.
5. Where, after the disagreement and discharge of a jury empaneled upon demand of the defendant in a justice of the peace case, in response to a motion by the plaintiff to assign another day for trial, the defendant objects to the jurisdiction, and, after the overruling of the objection, the justice proceeds to try the case on its merits, without the intervention of a jury, and renders judgment for the plaintiff, he acts without jurisdiction and the cause is properly removable by *certiorari* to the upper court. There being a demand for a jury standing on his docket he should summon and empanel another jury for the trial of the issue, unless such trial be waived.

No. 1069. Submitted May 7, '901. Decided May 23, 1901.

HEARING on an appeal from an order of the Supreme

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Statement of the Case.

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Court of the District of Columbia, overruling a motion to quash a writ of *certiorari* to a justice of the peace, and vacating a judgment of the justice and a writ of execution issued thereon, and remanding the cause to the justice with directions to proceed therein according to law. *Affirmed.*

The Court in its opinion stated the case as follows:

This is an appeal from an order of the Supreme Court of the District of Columbia upon a writ of *certiorari* issued by that court to restrain and vacate certain proceedings which had been had before a justice of the peace.

The appellant, Joseph B. Chamberlain, instituted a suit for \$261.30 against the appellee, Frank H. Edmonds, before Anson S. Taylor, Esquire, a justice of the peace for this District. On the day appointed for the trial the appellee appeared by attorney and filed a written demand for a trial by jury, in accordance with the provision of section 1009 of the Revised Statutes of the United States for the District of Columbia. Thereupon a jury was summoned for a subsequent day specified, and was then empaneled and sworn to try the issues between the parties. The jury failed to agree, and was discharged by the justice, whether with or without the consent of the parties to the cause does not appear. The appellant and the appellee were both present at the time of the discharge; and it is alleged in the petition, which was filed by the appellee for the writ of *certiorari*, "that no continuance of the cause was then asked by either party, nor was any announced by the court, and no date was set for a retrial of the case, and all the parties were permitted to go without day, and no regular continuance of the case was ever entered on the justice's docket." The justice, however, in his return to the writ, states that at that time there was an entry made either upon the papers or on his docket for a general continuance; that is, for a continuance without mention of any special day or time for further proceedings. The entry which appears in his return

is: "Continued for further hearing." It is conceded that no definite time was stated or set for such further hearing.

Some ineffectual negotiations ensued between the attorneys of the parties to have a day set for retrial; after which, a week after the discharge of the jury, the attorney for the plaintiff in the cause, the appellant here, filed a motion before the justice, and served notice upon the attorney for the defendant, the appellee here, for the assignment of another day for trial. Neither the defendant nor his attorney appeared in answer to this motion and notice. The justice assigned a day, of which the defendant and his attorney also had notice. On the day and at the hour specified for the trial, the attorney for the defendant appeared and filed an objection in writing to the jurisdiction of the justice, on the ground, as claimed, that jurisdiction had been lost by the failure of the justice to continue the cause properly; and also, on the ground that the cause had been discontinued by the failure of the jury to agree at the previous trial. This objection to the jurisdiction, which in the argument has been referred to as a plea, was overruled by the justice; whereupon the defendant's attorney left the court, and neither he nor his client participated in the subsequent proceedings before the justice.

The justice then proceeded to try the cause himself without a jury, and rendered judgment in favor of the plaintiff for the amount claimed, with costs. Some months afterwards a writ of execution was issued upon this judgment, which was returned "*nulla bona*." Subsequently there was a second writ of execution issued, under which there seems to have been a levy on goods of the defendant.

Thereupon the defendant filed his petition in the Supreme Court of the District for the writ of *certiorari* to be addressed to the justice, and praying to have the judgment rendered by the justice declared to be null and void. The justice made return to the writ, and set forth his docket entries and the proceedings which had been had before him, substantially as here stated. Two days before the return of the justice there was filed in the *certiorari* proceedings an

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affidavit of the attorney [Wallace] for the petitioner therein, defendant in the cause before the justice, wherein the affiant stated his version of the circumstances attending the cause before the justice. There were two returns by the justice, an original and supplemental one. On the same day with the latter there were filed in the *certiorari* proceedings an affidavit of Chamberlain and an affidavit of his attorney setting forth their version of the circumstances narrated by the attorney for the petitioner in his affidavit; and Chamberlain also answered at length and in detail the petition of Edmonds for the writ of *certiorari*. A motion was then filed on behalf of Chamberlain to quash the writ; and the cause then came for hearing on the record as thus made.

The court below overruled the motion to quash the writ, and entered an order vacating the judgment rendered by the justice of the peace and the writ of execution issued thereon, and remanding the cause to the said justice, with directions to proceed therein according to law.

From this order the present appeal has been prosecuted by and in the name of Chamberlain.

Mr. D. W. Baker and Mr. W. H. Sholes for the appellant:

1. The affidavit of Wallace was no part of the record at the time of the granting of the writ of *certiorari*, and was not, and could not, be filed as an answer to the answer of the respondent, nor could it contradict the return of the justice. *Carver v. O'Neal*, 11 App. D. C. 353; *Hendley v. Clark*, 8 App. D. C. 165; *Coughlin v. Blake*, 55 Iowa, 637.

2. The right of an inferior court, or the right of the justice of the peace to continue a case, is an inherent right of the court or justice without any regard to whether or not such right is given by statute, and this right has been exercised by justices of the peace in this District. See *Caswell v. Ward*, 2 Douglas (Mich.), 374; *Coughlin v. Blake*, 55 Iowa, 635; *Fiero v. Reynolds*, 20 Barb. 275; *Bradshaw v. Earnshaw*, 11 App. D. C. 495.

3. Immediately after the discharge of the jury the defendant conceived the idea that he would try to defeat the

rightful recovery by resorting to technical points of procedure. Such action has been condemned by this court. *Deposit Company v. Beck*, 12 App. D. C. 237.

4. For cases in which this court has considered the question of when a *certiorari* will not lie, see *Hendley v. Clark*, 8 App. D. C. 165; *Guaranty and Loan Company v. Pendleton*, 14 App. D. C. 384; *Bond v. Hardware Company*, 15 App. D. C. 72; *Carver v. O'Neal*, 11 App. D. C. 353.

Mr. Victor H. Wallace for the appellee:

1. The civil jurisdiction of a justice of the peace being entirely statutory, authority for all his acts must be found within the limits of the statute, or else it does not exist. In this case the jury disagreed. There is no statutory authority for another trial of the case, without the institution of a new action. If there is no provision in the statute for any further proceedings, then no other proceedings can be taken, and the case is at an end. *Gulick v. Van Tilburgh*, 16 N. J. Law, 417; *Waddell v. Physic*, 17 N. J. Law, 331. By section 1016, R. S. D. C., the only remaining duty of a justice of the peace, after the jury retires to consider their verdict, is to enter judgment on the verdict when it is rendered. If the jury disagree, of course such judgment cannot be entered. But all the justice's authority being limited to a specified act, he cannot do anything else; his powers under the writ issued in a particular case are terminated by the disagreement of the jury in such case. *Cathell v. Mead*, 35 Pac. Rep. 741 (Colo.); *Francis v. Weaver*, 25 Atl. Rep. 413 (Md.); *Felter v. Mulliner*, 2 Johns. 181.

2. The jurisdiction of a justice of the peace to try a case himself is ended by a demand for a jury trial. *Railway Co. v. O'Neal*, 10 App. D. C. 245; *Hill v. Neale*, 27 Wash. Law Rep. 235; *Killman v. Pirtle*, 28 Wash. Law Rep. 209; *Smith v. Chase*, 3 Cranch C. C. 348; *Adrians v. Johnson*, 24 Wash. Law Rep. 581; *Clayton v. Clark*, 55 N. J. Law, 509; *Subring v. Wheedon*, 8 Johns. (N. Y.) 460; *Murfrees*, Justice Practice, Sec. 531; *Ency. Pleading and Practice*, Vol. 12, p. 240. This rule is also tacitly

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recognized in *Hof v. Traction Co.*, 174 U. S. 1. A jury trial in this case having been demanded, where did the justice find jurisdiction to try the case himself? Not in the fact that at the first trial the jury disagreed, for, even if it be granted that such a disagreement did not of itself work a discontinuance, such disagreement did not invest the justice with jurisdiction to dispense with a jury in the further trial of the case. *Vanderwerker v. The People*, 5 Wend. (N. Y.) 530; *Grovier v. Hall*, 23 Mich. 7. Not in the fact that the defendant failed to make a second demand for a jury after the first had disagreed, for a demand for a jury, once properly made, is a continuing demand and need not be repeated. *Swasey v. Adair*, 88 Cal. 179; *Ten Eyck v. Farlee*, 16 N. J. 348, opinion of Ryerson, J.; Ency. Pleading and Practice, Vol. 12, p. 241, Sec. 4, par. 2. Not in the fact that the defendant did not appear at the second trial, for, had that trial been otherwise proper, such a failure to appear would not have been a waiver of the demand for a jury trial, nor invested the justice with power to try the case himself. *Haskins v. Wilson*, 5 Wis. 106; Murfree, Justice Practice, Sec. 531. We find in the statute the provision which divests the justice of jurisdiction to himself try a case upon demand of a jury trial. Secs. 1009 and 1010, R. S. D. C. But where is the provision which reinvests him with that jurisdiction after the case has once been submitted to a jury, unless the party demanding the jury consents to it? The following are a few of the great number of cases, arising in courts of record, where it has been held error to refuse a party a trial by jury, which has been properly demanded and to which he is entitled by law: *Fire Dept. v. Harrison*, 2 Hilton (N. Y.), 458; *Andrews v. Pritchett*, 66 N. C. 387; *Railroad Co. v. Gardner*, 19 Minn. 132; *Cahoon v. Levy*, 5 Cal. 294; *Freeman v. Bridges*, 26 So. Rep. 512 (Ala.); *Condon v. Gore*, 42 Atl. Rep. (Md.) 900; *Scott v. Rowland*, 37 S. W. Rep. (Tex.) 389; *Warwick v. Kingman*, 51 S. W. Rep. (Ind. Ter.) 1076; *Treadway v. Wilden*, 12 Nev. 113; *Woods v. Tanquary*, 3 Col. App. 515; *Reynolds v. Marble*, 12 La. 424.

3. A justice of the peace loses jurisdiction of a case by permitting its parties to depart without day. If he continues a case, the continuance must be to some specified time. A mere general entry of an indefinite continuance is not sufficient. *Lynsky v. Pendergrast*, 2 E. D. Smith (N. Y.), 43; *Mahr v. Young*, 13 Wis. 710; *Crandell v. Bacon*, 28 Wis. 671; *Brahmstead v. Ward*, 44 Wis. 591; *Brosde v. Sanderson*, 86 Wis. 368; *Edwards v. Hance*, 12 N. J. Law, 125; *Woodworth v. Wolverton*, 24 N. J. Law, 419; *Harrison v. Chipp*, 25 Ill. 471; *Roberts v. Hathaway*, 42 Mich. 592. The special appearance of the defendant at the second trial for the purpose of objecting to the jurisdiction of the court, cannot, in any wise, be regarded as a revival of process or a waiver of errors. *Savings Co. v. Pendleton*, 14 App. D. C. 384; *Martin v. Falls*, 18 Me. 29.

Mr. Justice MORRIS delivered the opinion of the Court :

1. In the interest of good practice we deem it proper to notice with disapproval some irregularities that occur in the proceedings in the present case, all of which seem to have arisen from the erroneous frame of the petition for the writ of *certiorari*.

The caption of that petition implies that the proceeding is one between Chamberlain and Edmonds. The title is "*Frank H. Edmonds v. Joseph B. Chamberlain*"; and it has been very naturally assumed by Chamberlain and his attorney that Chamberlain is a party respondent to the petition, and as such entitled in his own name to appear and answer it. On the contrary, in contemplation of law, and by the very terms of the petition itself, the justice of the peace is the sole respondent to it, and the only person required or entitled to make return thereto. It is very true that the person substantially interested is not the justice of the peace, but the other party to the cause before the justice, and that upon him, and not upon the justice, is the burden oftentimes of preparing the return, and always, after the return, the burden of sustaining the propriety of the action of the jus-

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tice. But the justice alone is competent to make the return to the writ, and he alone is the formal respondent to the petition; and it is by reason of the fact that he is a judicial officer, necessarily assumed to be impartial between the parties, and because the return to be made is of the proceedings before him, that the verity attributable to the return is not usually allowed to be controverted by the introduction of oral evidence. It is, therefore, irregular and not to be sanctioned, that a party interested in the cause before the justice should be made a party respondent to the petition for the writ of *certiorari* to bring up the record of the proceedings before the justice; although it may be proper enough, in an appropriate case, for the justice to include in his return to the writ, the cause of such party so far as it has been made to appear to him. There may be cases in which *certiorari* will lie, in which it would be proper to make those persons who are interested on the record parties thereto; but with us, *certiorari* from a superior to an inferior tribunal to bring up the record of the latter for the purpose of ascertaining whether it is proceeding within its jurisdiction is not a proceeding in equity, but one at common law wherein it is not proper to join as defendants or respondents those who have different interests.

2. But even if it were proper to make the appellant Chamberlain a party to the petition for the writ of *certiorari* on the ground that he was a party to the proceedings before the justice of the peace, which it is sought to review, it was not proper to inject into the cause the several affidavits which we find in the record before us. This is not a cause to be tried upon affidavits; and these affidavits serve no useful purpose whatever. Affidavits may properly be incorporated into a petition, or made part thereof; and they may similarly be annexed to a return; but independent affidavits, which constitute no part either of the petition or the return, are improper in proceedings upon a writ of *certiorari*. There is here, it is true, some justification for the affidavit of the appellant Chamberlain, inasmuch as it purports to be an answer to the petition, and he was invited by the form of the

petition and the affidavit of the appellant's attorney is annexed to the appellant's answer as part of it; but there is no ground for the introduction of the affidavit of the appellee's attorney. We propose to disregard all these affidavits; and we have the less hesitation in so doing, since the questions involved can be disposed of without any reference whatever to them. It is sufficient for us to consider the petition and the return of the justice of the peace to the writ, in order to determine the propriety of the order which was made thereon.

3. Proceeding to the merits of the case, we may express the regret that the course of legislation in regard to the jurisdiction of justices of the peace and the tenor of judicial decision thereon, has tended to leave the whole subject in a somewhat anomalous and chaotic condition. Part of the difficulty will no doubt be removed in the near future in consequence of the adoption of the new code of law for the District of Columbia whereby it is provided, among other things, that after it goes into effect, there shall be no more trials by jury before justices of the peace. And it is believed that, in other respects, questions like some of those now before us, may be obviated in the future and greater certainty secured in the administration of the law, by the exercise of the power given to the Supreme Court of the District of Columbia, by section 996 of the Revised Statutes of the United States for this District, to "make and establish rules of practice, and prepare and publish forms of pleadings, for bringing all forms of actions, and the trial thereof, before justices of the peace."

In view of the near approach of the time when trial by jury, or what is known as such, before justices of the peace must cease, it would serve no good purpose now to attempt any elaborate inquiry into the function of such a body under the existing law. Suffice it to say that we do not find it to be either the letter or the spirit of the existing law, that, when a trial by jury is demanded before a justice of the peace, the jurisdiction of the justice then absolutely ceases, except that he is, of course, to organize the jury, record its

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verdict, and enter judgment upon such verdict. This is the theory of the appellee in the present case. But, while it is true that, when a jury has been demanded and organized before a justice of the peace, that body supersedes the justice in the trial of the issue joined between the parties, as the statute specifically provides and requires, yet it is quite plain from the statute itself that it was not the intention of the law to give to a jury in the court of a justice of the peace any greater power or authority than appertained to a common-law jury in a court of general jurisdiction; and it is equally clear that it was not the intention of the law wholly to oust the jurisdiction of the justice upon the empanneling of his jury, for his authority is expressly continued to receive the verdict, to enter judgment thereon, and to supervise the execution of such judgment. In other words, the cause is pending before the justice all the time; and the jury is only an instrumentality to determine the issue of fact which is evolved in the progress of such cause, which is precisely the same purpose which the common-law jury subserves in a court of the common law. While in the court of the justice of the peace — for we must regard it as a court, although of limited and inferior jurisdiction — there are no formal pleadings, and, therefore, no formal joinder of issue, yet the plain meaning of the provision of the statute that, *after issue joined*, a trial by jury may be demanded, is that the issue for which such trial is desired, is the same kind of issue, one merely of fact, that is tried by a common-law jury in a court of general jurisdiction. And if this be the function of the jury, and the whole function of the jury in the one case as in the other, it necessarily follows that the court of the justice of the peace, as a court, continues in the control of the cause, and that the cause is not terminated in any event either by the agreement of the jury or by its failure to agree. For the disagreement of the jury and its consequent discharge must be presumed to have been contemplated by the law, as well as its agreement and the rendition of a verdict.

It is no sufficient argument to say that the jurisdiction of

the justice of the peace is purely statutory, that his jurisdiction is to be limited by the strict letter of the law, and that there is to be no intendment made in favor of his jurisdiction. This is all true, but it is not to the point. The question here is not one of jurisdiction, but of procedure. Under the statute there was here undoubtedly jurisdiction both of the subject-matter and of the parties. By the general provisions of the statute the justice of the peace is fully empowered to adjudicate the whole controversy. By a special provision of the statute a jury is authorized in a certain contingency to determine a certain issue in the cause. But the jury is neither expressly, nor by implication, nor by reasonable intendment of the law, given charge of the whole cause; and we think that it would be unwarranted judicial legislation to hold that it was the effect of the statute to give it such entire control of the case. When the law says that the justice of the peace shall have full and entire jurisdiction of a cause and be empowered to determine each and every issue in it, and then provides that, in a certain contingency, a jury shall be summoned to try issues of fact, it requires no relaxation of the most rigid rules of statutory construction to hold that the general jurisdiction of the justice remains, except to the extent and for the purpose merely to which it is remitted to the jury in the contingency contemplated. To hold otherwise would be to violate the very principle of strict construction contended for by the appellee, and to invest the jury with a jurisdiction not conferred upon it by the express terms of the statute, and for which there is no good ground, either in the policy of the statute itself or outside of it.

We have said that the question here was one of procedure, not of jurisdiction. Now, every court, however inferior and limited, when acting within its jurisdiction, must be presumed to have the authority to take all reasonable and proper steps to give effect to such jurisdiction. Every court, for example, however limited, may make reasonable rules for the conduct of its business. If it is authorized to adjudicate causes, it must be presumed to have the authority to take the

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testimony of witnesses to aid in such adjudication. This is not an enlargement of jurisdiction by construction, but the establishment of a procedure to give effect to the jurisdiction.

Now, we know that, in a court of general jurisdiction, the effect of the disagreement and discharge of a jury is simply to leave the issues untried and undisposed of, and to remit the parties to the position which they occupied before the jury was empaneled. The condition is as though no jury had been empaneled. Is there any good reason or any warrant of law for giving a greater effect, an effect destructive of the administration of justice, to the discharge of a jury, consequent upon disagreement, in the court of a justice of the peace? We find no such reason and no warrant of law for any such conclusion. On the contrary, if the theory of the appellee on this point were correct, it would follow that the justice of the peace had no authority to discharge the jury, and that the jury might be regarded as yet an effective body to be recalled for the completion of its duties. It would follow, in fact, that there could be no discharge at all of the jury until it had agreed upon a verdict. But no more in the court of a justice of the peace than in a court of the common law of general jurisdiction—much less, in fact—would the civilization of our age tolerate the barbarous methods whereby juries were coerced into verdicts by their being kept together indefinitely until they should agree.

We are of opinion that, under the statute, it was within the province of the justice of the peace to discharge the jury in this case, when it became reasonably certain to him that it could not be brought to an agreement; and that the effect of such disagreement and of the consequent discharge of the jury, was not to terminate the cause and oust the jurisdiction of the justice, but simply to remit the parties to the position which they held before the jury was empaneled.

4. The next contention is that, even if the disagreement and discharge of the jury did not terminate the cause, the

jurisdiction of the justice was lost by his failure to make any specific continuance of the cause to a day and time certain, which, it is claimed, operated as a discontinuance, and by the discharge of the defendant without day, which is assumed to have been the result of such discontinuance.

But what we have said with regard to the effect of the discharge of the jury is, also, to a certain extent, applicable to this proposition. By that discharge, as we have just held, the cause was left as it stood before the jury was empaneled, with an issue joined and a demand for a jury to try such issue. When the demand for a jury was filed, which was then the last step in the cause, it required no entry of a continuance to any day certain to keep the cause alive. It was not required that there should be any immediate action by the justice to comply with the demand. The cause would not have been abated, if it had been permitted to slumber indefinitely. Such would not have been the result in a court of general jurisdiction after issue joined, which of itself operates as a demand for a trial by jury. There is no entry of continuances now required in such cases, if there ever was. The condition is such that, in such case, either party may at any time, upon motion and notice, call up a cause, and put the instrumentalities in motion for its trial by a jury. Why should we apply any different rule in causes pending before a justice of the peace? And why should not the rules of procedure, dependent upon general principles of universal application, such as motion and notice, be as applicable in the court of a justice of the peace as in a court of general jurisdiction? Indeed, in the absence of specific rules specifically authorized, we would be disposed to hold that the rules of procedure of courts of general jurisdiction are applicable, so far as circumstances will permit, in the courts of justices of the peace.

Proceedings before justices of the peace are intended to be simple and as free as possible from legal technicalities. There are no formal pleadings, no terms of court, no formal continuances, no rigid rules of procedure, such as are necessary in courts of general jurisdiction. As is well known,

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the purpose of the establishment of these inferior and limited tribunals is to facilitate the settlement of petty controversies, which are too small in amount or character to justify the intervention of the courts of general jurisdiction. Consequently they are authorized to proceed, not according to the rigid rules of the common law, but as the statute specifically enacts, "*according to law and the equity and right of the matter*"—words which have always been understood to require the administration of substantial justice in these tribunals without much reference to the technicalities of the law. The court of the justice of the peace is always open; it has no terms; and the law of continuances has not much application to it. It would require a very rigid application of that law to the present case to procure a discontinuance of the cause. We do not think that it applies at all.

Moreover, it is to be remarked here that the appellee, in response to the notice served upon him, appeared in court at the time set for the trial; and whether there is any question as to the propriety of calling up the cause by motion and notice or not, he was there in pursuance of the pendency of the cause. It is true that he then and there objected to the jurisdiction of the justice and his authority to proceed in the cause, and claimed that it had been discontinued. But it would have been the safer and the better course for him to have proceeded with the cause and raised the question of jurisdiction and reserved it for the appellate court.

5. After the defendant had appeared before the justice of the peace and filed his objection to the jurisdiction, and this objection had been overruled, the justice proceeded to try the cause on its merits, without the intervention of a jury, and he rendered judgment for the plaintiff. We think that in this he transcended his jurisdiction and acted without warrant of law.

There was at that time standing upon his docket a demand of the defendant for a trial by jury, which had not been gratified; for, of course, the fruitless result of the trial which was had did not satisfy the demand. Nor did the objection to the jurisdiction, which was afterwards interposed and

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which counsel for appellant seem to treat as a plea *puis darrein continuance*, have the effect of obliterating from the record the demand for a trial by jury. Even tested by the rigid rules of pleading, which we have said should not apply to causes before justices of the peace, this plea, if plea it can be called, amounted to no more than a suggestion that the occurrences in the cause subsequent to the demand for a jury, amounted to a discontinuance; and when it was overruled, it left the cause precisely as though it had not been interposed. It was not a substitute for any previous pleading; and it did not have the effect of withdrawing any previous pleading. It left standing the *issue joined* between the parties, and the demand for the trial of that issue by a jury. That demand was a continuing demand; and its disregard by the justice and his trial of the cause himself constituted an assumption of jurisdiction not warranted by law.

It is of no consequence in this connection that, upon the overruling of the defendant's objection to the jurisdiction, the defendant and his attorney left the court and did not return. *Non constat* that he might not have remained or would not have returned, if the trial by jury had been awarded to him, which he had demanded. While he might have remained and reserved the question of jurisdiction, he was not bound to be present at a trial by the justice which the justice had no warrant of law to hold; nor can his withdrawal from the court be construed as a withdrawal or abandonment of the demand for trial by jury.

6. The questions here raised appear to be somewhat novel in this jurisdiction, notwithstanding that the statute under which they arise has been on the statute book for upwards of three-quarters of a century. But this may readily be accounted for by the fact that trials by jury before justices of the peace were for a long time comparatively rare, and have never at any time fully commended themselves to the better sense of the community. The decisions of other jurisdictions, depending perhaps on different local laws or a different public policy, may not be a safe criterion for our guidance in our construction of our own laws; but so far as they

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go, they would seem to sustain the positions here taken. See *Vanderwerker v. People*, 5 Wend. 530; *Grovier v. Hall*, 23 Mich. 7; *Ten Eyck v. Farlee*, 16 N. J. 348; *Swasey v. Adair*, 88 Cal. 179; *Haskins v. Wilson*, 5 Wisc. 106. Of course, no authority is needed to support the proposition that, when a trial by jury is demanded, the justice himself is then without authority to try the issues for which the trial is demanded; for such is the letter of the law. But it would not be correct to say that the authority is then absolutely at an end in such sense that it may not be revived and recalled into effect; for undoubtedly the voluntary withdrawal of the demand would restore it, and would reinvest the justice with the full authority which he had prior to the interposition of the demand.

It is our conclusion, (1) that the discharge of the jury in this case, consequent upon its disagreement, did not terminate the cause, or take away from the justice the power to proceed further therewith; (2) that the failure of the justice after such discharge to continue the cause, by assignment thereof to some day certain thereafter, did not effect a discontinuance thereof, or operate to discharge the defendant therefrom; but that the cause remained in court, subject to be taken up again at any reasonable time thereafter upon motion and notice; (3) that, upon such motion and notice, it was the duty of the justice, without any further or other demand therefor, to summon and empanel another jury for the trial of the issue between the parties, unless such trial was waived; and that it was not competent for him to try that issue himself without a jury.

In accordance with these conclusions we understand to have been the views of the court below; for such is the necessary inference from the order which it made and from which the present appeal has been taken.

The order appealed from, therefore, will be *affirmed, with costs; and the cause will be remanded to the Supreme Court of the District of Columbia in order to carry said order into effect. And it is so ordered.*

LANCKTON v. THE UNITED STATES.

APPELLATE PRACTICE; APPEALS; PRESUMPTIONS; CRIMINAL LAW; INDICTMENT; MOTIVE; INSTRUCTIONS; INTOXICATION.

1. Under Rule V of this court, requiring that a transcript on appeal shall show in the caption nothing more than the title of the case, the names of the parties in full and the time of the commencement of the proceeding, it will be presumed that all proceedings prior to the filing of an indictment set forth in such a transcript were regular, and such presumption will continue until rebutted by facts and conditions properly presented in a bill of exceptions.
2. The Supreme Court of this District is a court of general jurisdiction and its terms are fixed by law, of which this court is bound to take notice, and it is not necessary to the legality of the sessions of its several branches that the minutes should recite the appearance of the clerk and marshal at the opening of the term, or that the sitting was in the District and in the building designated for the purpose. Regularity in these respects is necessarily presumed.
3. Where the transcript of the record on appeal, in a criminal case, shows that the grand jury was empaneled at a regular term; that a foreman was duly appointed and that the indictment upon which the accused was tried was returned in open court, indorsed "a true bill," over the signature of the foreman, it must be presumed that the grand jury empaneled was the grand jury required by the Constitution and the law, and that the true bill returned in open court was concurred in by the requisite number of the grand jurymen; and that the foreman's name, as written in the indictment, contains only the initial of his given name, while the minutes recite his full given name, is a fact of no consequence.
4. The British Statute of 1 Hen. V, Ch. 5 (A. D. 1413), requiring every indictment to set forth "the estate, or degree or mystery of the defendant," and to aver "the town, hamlet or place or county in which the defendant is or was conversant," is not in force in this District.
5. An indictment for murder which alleges that the crime was committed in the District of Columbia, and in a certain house situated therein, is not insufficient because it omits to allege the precise locality of the house.

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6. It is not error for the trial court, in a murder case, to instruct the jury that it is not necessary for the prosecution to prove a motive, but that absence of proof of motive may be considered as a circumstance in favor of the accused.
7. It is not error for the trial court in a murder case to refuse a prayer for instruction by the accused to the effect that if it were probable that the deceased came to her death from any other cause whatever than from violence inflicted on her by the accused, the jury should find him not guilty, where, in addition to a general charge showing the necessity of proof beyond a reasonable doubt, the court instructs the jury, at the request of the accused, that if the death of the deceased can be accounted for on any other hypothesis whatever, than that she came to her death as a result of injuries inflicted by the accused, it is their duty to acquit him.
8. The refusal of a trial court to grant a prayer for instruction by a defendant indicted for murder to the effect that if the jury find the accused was intoxicated when the offense was committed they might take the fact of intoxication into consideration in determining the grade of punishment which should be inflicted, if error at all, is not prejudicial error, where the accused is convicted of manslaughter only.
9. The voluntary intoxication of a person accused of a crime cannot be considered in determining the character of the crime committed, voluntary intoxication being neither an excuse or palliation for crime, *following* Harris v. United States, 8 App. D. C. 20.

No. 1070. Submitted May 8, 1901. Decided May 23, 1901.

HEARING on an appeal by a defendant indicted for murder from a judgment of the Supreme Court of the District of Columbia entered upon the verdict of a jury finding him guilty of the crime of manslaughter. *Affirmed.*

The COURT in its opinion stated the case as follows:

The appellant, James Lanckton, was indicted on May 11, 1900, for the murder of one Betty L. Wren in the District of Columbia. On November 17, 1900, he was convicted of manslaughter, and was subsequently sentenced to imprisonment in the penitentiary for eight years, after motions in arrest of judgment and for new trial had been overruled.

The evidence on behalf of the Government tended to show the following facts: Bettie L. Wren was a clerk in the office

of a pension attorney and was about fifty-four years of age. She occupied a house in the City of Washington, No. 634 E street, southwest. Lanckton was about sixty-six years of age, and first met Mrs. Wren in the office where she was employed. He shortly afterwards went to live in her house by her invitation, and apparently without charge. He claimed to have become engaged to be married to her. He was sometimes intoxicated, and then used abusive language to her, and threatened to kill her and another man who occupied a room in the house. On the night of the 12th of March Mrs. Wren called in a policeman and complained that Lanckton had struck her. He was intoxicated. She, at first, wanted him taken away, but finally consented to his remaining. March 14th she kept her bed, complaining of pain and weakness. She sent for a servant to nurse her, to whom she said, in Lanckton's presence and hearing, and without his denial, that he had struck her. The left side of her face was swollen and one eye closed. March 17th, a physician was called in. He found her in a semi-comatose state. The pupil of one eye was dilated; the other contracted. The left eye was blackened and had an abrasion upon it. She said in the presence of Lanckton that he had struck her a blow. He was drunk, and the physician compelled him to leave the house. She was removed to the Columbian Hospital, in the city of Washington, on March 19th, and died there March 29, 1900. An autopsy made by the deputy coroner, a competent surgeon, disclosed a large and fresh blood clot within the left side of the skull, and an exceedingly small one at or in the base of the brain at the back of the head. Other organs of deceased were in apparently healthy condition. The opinion formed was, that the blood clots were the result of a blow received upon the left side of the head; or might have been caused by falling and striking the head upon the floor.

An aged, crippled and practically deaf and dumb sister of the deceased was examined by the Government, and was the only witness who saw the assault. She testified by signs, and these were interpreted by a servant who was familiar with them and could communicate with her.

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Before she was permitted to be introduced as a witness, the justice presiding caused her to be carefully examined by Doctor Gallaudet, of the Institute for the Deaf and Dumb, who pronounced her competent to testify, and the servant competent to interpret her signs. The court was satisfied from her signs that she comprehended the nature of an oath. No objection was offered to her competency, or to that of the interpreter. Her testimony was very brief, indicating that she saw Lanckton strike her sister on the head with his hand or fist.

Lanckton, testifying on his own behalf, denied striking the deceased. He attributed her injury to a fall that she had received. He said that she had been complaining of weakness, and asked him to assist her to rise from her bed and sit upon a stool by its side.

Whilst seated upon the stool, she fell to the floor, striking her head, and was unconscious for a time. He also denied that she had charged him with striking her. He said he had been drinking heavily before and after the 12th of March, and that he was intoxicated when ordered by the physician to leave the premises.

Medical experts, on behalf of the accused, testified that the formation of the blood clots might have been, and most probably had been, caused by a diseased state of the blood vessels of the brain.

They had not seen the deceased, either before or after death, and formed their opinions on the general evidence and the statement of the deputy coroner of the details of the autopsy. They thought his opinion unreliable because he had not made an examination of the brain and the blood with a microscope.

On cross-examination of the defendant it appeared that he had spent the bulk of his life in a circus as an exhibitor of feats of strength.

The defendant was duly arraigned and pleaded not guilty, but was, subsequently, permitted to withdraw the plea and file the following motion to quash the indictment:

"1. Said indictment purports to have been found and re-

turned by a grand jury into the Supreme Court of the District of Columbia, holding a criminal term, known as the April term, A. D. 1900, and there is no record in said court showing that the same, holding a criminal court for the April term, 1900, was ever organized as required by law.

" 2. There is nothing in the record showing that on the first day or any other day of the April term, 1900, of said court there was present, at the time of any organization thereof, any officer other than the presiding judge.

" 3. That part of the record of the April term, 1900, of said court purporting to show the proceedings before the Supreme Court of the District of Columbia, holding a criminal court, division No. 1, for the trial of crimes and offenses arising within the District of Columbia, does not state or show that there was any clerk of said court or deputy clerk of said court or any United States marshal or deputy United States marshal for said District present, nor does the record of said court show who of the members constituting said court were present, or who went to constitute the court, nor does it show where the said court was held.

" 4. There is nothing in the record of the Supreme Court of the District of Columbia for the April term, 1900, which shows that said court was held at the place fixed and designated by law for the holding of said court.

" 5. The record does not show that there was at the April term, 1900, of the Supreme Court of the District of Columbia a grand jury, duly and legally organized, with authority to discharge the legal duties incumbent upon a grand jury in and for said District, for the April term, 1900, of said court.

" 6. The record does not show that the said indictment was found and returned into court by a legally constituted grand jury.

" 7. The record does not show the place where the court was sitting at the time which said indictment purports that it was returned into court, nor does it show what officers of the law then constituted said court.

" 8. There is in the minutes purporting to be the minutes

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of division 1 of the Supreme Court of the District of Columbia for the April term for the trial of crimes and offenses arising within said District, at the April term of the court for the year 1900, that which purports to be an organization of the grand jury, wherein it is stated 'William H. H. Cissel is appointed by the court as foreman of the grand jury,' and the indictment in this case is marked 'A true bill. W. H. H. Cissel, foreman.' Said indictment is not marked 'A true bill. William H. H. Cissel, foreman.'

"9. There is nothing in the record which shows that said indictment was found with the concurrence of at least twelve grand jurors, nor that it was returned into court in the presence of at least twelve grand jurors.

"10. There is no record of said court showing that the grand jury ever found or returned into court any valid legal indictment against said defendant.

"11. There is not made or stated in said indictment, as by law is required to be, the estate or degree or mystery of the said defendant, nor of the town or hamlet or place or county of which he was and in which he was conversant at the time of the alleged finding of said bill of indictment, to wit, May 11, 1900.

"12. It is not stated or averred in said indictment that the said James Lanckton was of or conversant or residing in the county of Washington, District of Columbia, on May 11, 1900, the time at which said indictment was filed in said court.

"13. It is not shown or stated in said indictment that the grand jurors comprising the grand jury for said term of said court were in or of the county of Washington, in the District of Columbia.

"14. There is nothing in the record of said court, nor in said indictment, which shows that the grand jurors who it is alleged found said indictment and returned it into court were legal or competent grand jurors, either of the county of Washington or the District of Columbia.

"15. It is alleged in said indictment that the said James Lanckton, on March 12, 1900, at the District aforesaid, and

in a certain house there situate, did feloniously, willfully, and with malice aforethought make an assault upon one Betty L. Wren. The said indictment is insufficient in that it does not more particularly locate and describe the said certain house, and said statement in said indictment is vague, indefinite, and insufficient in law."

This motion is incorporated in the bill of exceptions, which shows that it was overruled and that exception was reserved. The records of the court relating to the empanneling of the grand jury and the return of the indictment are not set out in the bill of exceptions. The printed record prepared under the rules of this court shows that the indictment was filed in open court May 11, 1900. It contains the usual recital of presentation by the grand jurors of the District of Columbia, and sets out the offense of murder in two counts. The assault is charged as of the 12th of March, 1900, and the death as its result on March 29th, in the District of Columbia, without further specification of place.

The indorsement on the back of the indictment shows number and title of case, names of the witnesses and concludes as follows: "A true bill" (signed) "W. H. H. Cissel, foreman."

After the motion was overruled, the defendant was not rearraigned, but entered a plea of "not guilty" and the trial proceeded. After verdict, a motion in arrest of judgment was filed, founded on the objections set out in the motion to quash, which was also overruled, with exceptions reserved. Motion for new trial was then filed and overruled.

[The further material facts will be found stated in the opinion.—REPORTER.]

Mr. Fred Beall for the appellant.

1. This is an appeal and not a writ of error, and being an appeal it brings up, or should bring up, the entire record from the court below, except as restricted by Rule 5 of this court. Appeals had their origin in the civil law, and remove causes entirely from a lower to a higher court, subjecting the law

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and facts to review. *United States v. Goodwin*, 1 Cranch, 110. There are no presumptions in favor of the jurisdiction of the courts of the United States. The record must show affirmatively the necessary jurisdictional facts. *Ex parte Smith*, 94 U. S. 455; *Hopt v. Utah*, 114 U. S. 488.

2. The record in this case is defective, (1) in not stating the time of holding the court; (2) in not stating the place; (3) in not stating that the indictment was returned into the court by the grand jury; (4) in not showing an arraignment; (5) in not showing that the defendant plead to the indictment. 1 Bishop's New Crim. Proc., Secs. 1341-1347; *McKinney v. People*, 2 Gilman (7 Ill.), 540; 1 Chit. Crim. Law, 327, 720; *Garter v. State*, 46 Miss. 44; *Mulligan v. State*, 47 Miss. 304; *Grandison v. State*, 2 Humph. 451; *Carpenter v. State*, 1 Morris State Cases (Miss.), 126; 2 Hawk. P. C., Sec. 128; 2 Hale, 166; Whart. Crim. Pl., Sec. 92; *Fitzgerald v. State*, 4 Wis. 395; Rule 11, Sup. Ct. D. C.

3. The indictment is insufficient. The Statute of 1 Henry V, Ch. 5, Sec. 1, which is found on page 460 of the Compiled Statutes in force in the District of Columbia, as brought forward from Alex. Brit. Stat. 214, 216, and Kilty's Rep. 226, requires that in all indictments there shall be made the additions of the defendant's estate or degree or mystery, and of the towns or hamlets or places and counties of which they were or be, or in which they be or were conversant, and the failure to do so will cause an abatement of the indictment. That statute was in force in the State of Maryland in 1801, and has been brought forward properly as a part of the laws of the District of Columbia. It has never been repealed by any act of Congress nor has it been modified in any way unless by section 1025 of the United States Revised Statutes, and that statute does not repeal the old English statute. See *Hughes Case*, 2 H. & McH. 479; *Hammond v. State*, 14 Md. 135; *Com. v. France*, 2 Brewst. 568; *State v. Moore*, 14 N. H. 451; 2 Va. Cases, 374 and 401; *State v. Bishop*, 15 Me. 152; *Com. v. Lewis*, 1 Metc. 151; *Com. v. Jackson*, 1 Grant, 262; 4 Bac. Abr. 315; Whart. Crim. Law, Sec. 24; Archb. Crim. Pl. & Pr. 243, and notes.

4. The indictment alleges that the offense was committed "at the District aforesaid," referring to the caption of the indictment, and "in a certain house" situated in said District. It is insisted that the allegation of place is insufficient under the rules of practice, as recognized in the common law by the United States Supreme Court. *Ledbetter v. U. S.*, 170 U. S. 606; 1 Chit. Crim. Law, top p. 195; 1 Chit. Pl. (4th ed.) 249; *Com. v. Springfield*, 7 Mass. 15.

5. The record does not show that the defendant entered any plea to the indictment after the overruling of his motion to withdraw his plea of not guilty and to enter a motion to quash the indictment. It is absolutely necessary in cases of felony that the records show affirmatively that the accused was arraigned and plead in person to the indictment. *Cachute v. State*, 50 Miss. 165; *Yundt v. People*, 65 Ill. 372; *Com. v. Harvey*, 103 Mass. 451; 1 Bishop's New Crim. Proc., Sec. 1354; *Early v. State*, 1 Tex. App. 248; *Stacey v. State*, 3 Tex. App. 121; *People v. Corbett*, 28 Cal. 325; *People v. Lightner*, 40 Cal. 220. The record does not show what issue was submitted to the jury, and without a plea there was, in fact, no issue submitted, and since the verdict must always respond to the issue, if there was no issue there could be no legal verdict.

6. When all the testimony had been introduced, the defendant requested the court to instruct the jury to return a verdict of not guilty. This the court refused, and to the action of the court in refusing to so instruct the jury the defendant excepted. This request should have been granted. There is no testimony whatever in the record which shows or tends to show: 1st. That the defendant ever struck or beat the deceased with his fist, or that he ever threw her down on the floor. 2d. There is no testimony in the record which tends to show with what the defendant ever struck or beat the deceased, or the means or manner by which she received any wound, whether mortal or otherwise. 3d. There is no evidence which establishes the fact that the defendant ever inflicted upon the deceased a mortal wound. 4th. There is no proof which shows that the deceased died in the District of Columbia.

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7. There is no proof in the record which establishes that the deceased came to her death as the result of violence. That she was killed or that she died from other than natural causes has not been proven. It is never competent to prove the *corpus delicti* by the extra-judicial confessions of the accused, nor are confessions admissible until the fact that a crime has been committed has been established. Facts ascertained by reason of an accused's confessions may be taken into consideration in establishing the *corpus delicti*, but the confessions of a party not made in court, or in some judicial proceeding but to an individual uncorroborated by circumstances, and without proof *aliunde* that a crime has been committed, will not justify a conviction. The *corpus delicti* must be proved beyond a reasonable doubt by evidence other than the extra-judicial confessions of the accused. *Robinson v. State*, 12 Mo. 592; *State v. Scott*, 39 Mo. 424; *Pitts v. State*, 43 Miss. 472; *Stringfellow v. State*, 26 Miss. 157.

8. The indictment charges that the decedent died in the District of Columbia, but there is no proof of that allegation. The proof shows that she was carried to the Columbian University Hospital on March 19th, and there was an autopsy performed on her body at that hospital on March 29th, but there is no proof as to when or where she died. She might have been taken to the Johns Hopkins, at Baltimore, or anywhere else, as for that matter, where she died on March 27th or 28th, and then her remains brought back after death to the Columbian University Hospital. It is only a matter of inference that she died at the hospital in the District of Columbia. The place of her death is under the frame of the indictment a part of the venue, and the venue is a part of the crime, and must be proven. *Moore v. State*, 55 Miss. 422.

Mr. Ashley M. Gould, United States Attorney for the District of Columbia, for the United States:

1. The record brought up on this appeal does not purport to set forth the organization of the criminal term of the Supreme

Court of the District of Columbia, nor the empaneling of the grand jury. Under the rules of this court, it is rendered unnecessary to set out any of these matters of record unless it is desired to bring before this court some specific point directed against either the validity of the organization of the court or the constitution of the grand jury. Rule No. 5 of the rules of this court. The record as certified by the clerk of the Supreme Court of the District fully sets forth all jurisdictional facts. *Young v. State*, 6 Ohio, at p. 436; *Turns v. Commonwealth*, 6 Metc., at p. 233.

2. It is contended, however, by learned counsel for appellant, in his motion to quash, that the indorsement by the foreman of the grand jury upon the indictment of the words "A true bill" was of no effect, for the reason that only the initial of the Christian name of said foreman was signed by him. But it has been repeatedly held that the initials of the Christian name of the foreman are sufficient. *Hudstill v. State*, 7 Ga. 2; *Wassels v. State*, 26 Ind. 30; *State v. Taggart*, 38 Me. 298; *Com. v. Gleason*, 110 Mass. 66; *Easterling v. State*, 35 Miss. 210. When the record discloses that an indictment was signed by the prosecuting attorney, indorsed "A true bill" by the foreman of the grand jury, and filed by the clerk, it is sufficient to show that the indictment was duly returned and presented in open court. *State v. Jones*, 2 Kan. App. 1; *State v. Lord*, 118 Mo. 1.

3. It is next contended that the indictment is fatally defective for the reason that it fails to allege the defendant's "estate, degree, or mystery, and of the towns, or hamlets, or places and counties" of which he was conversant. The necessity for such additions to defendant's name, it is claimed, arises from the statute of 1 Henry V, c. 5, known as the "Statute of Additions," which is alleged by learned counsel to be in force in this District. But counsel for appellant has waived this defect, if it be a defect, by failing to raise it in the court below by a plea in abatement and tendering therein the proper degree or mystery of the defendant. The omission at most amounts to a misnomer of the defendant, and it is elementary law that a misnomer of the de-

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defendant does not render the indictment fatally defective, but that objection on that ground can be taken only by a plea in abatement, which must give the true name of the defendant. Under the above-cited statute of 1 Henry V, c. 5, the same rule applies where an addition is omitted or misstated. The appellant, having failed to give his degree or mystery in his motion to quash, cannot, after that motion has been overruled, plead not guilty under the name given in the indictment, and after verdict raise the question of misnomer. 1 Chit. Crim. Law, star p. 204. But a perusal of the statute in question makes it very evident that it has no application to conditions now existing within the District of Columbia. *State v. McDowell*, 6 Blackf. 49. It is further respectfully suggested that the classification of citizens of this country by their "degrees" or "mysteries," when they appear before the courts, is not in harmony with the spirit of our institutions. Such a classification and designation at this day, when all men are equal before the law and when social distinctions have no place in courts of justice, would not only be repugnant to our theories of the administration of the law, but would be utterly useless — mere forms — serving no legal purpose whatsoever. The reason of the rule failing, the rule itself should be abrogated. If this ancient law should be admitted to be in force in this District, its provisions would be but matters of form, and the failure to insert them in indictments would be cured by section 1025 of the Revised Statutes of the United States. So far as giving the addition of the place in which the defendant has been conversant, it has always been held, under the statute in question, that it is proper to describe him as of the place where the offense was committed, even though he may in fact live elsewhere, because he is considered as having been conversant in that place. 1 Chit. Crim. Law, star p. 210.

4. The indictment in this case charges the appellant with the commission of the crime "at the District aforesaid and in a certain house there situate." Counsel for appellant insists that this allegation of place is insufficient, and that the pleader should have designated the particular part of the

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District of Columbia in which the fatal blow was struck. He cites no adjudicated case which sustains this contention. To the contrary, see *Com. v. Tolliver*, 8 Gray, 386 (followed in *Com. v. Creed*, 8 Gray, 387, and in *Com. v. Lavery*, 101 Mass. 207); Whart. Crim. Pl. & Pr. (8th ed.), p. 139, and cases cited; *O'Connell v. State*, 6 Minn. 279; *State v. Moore*, 24 So. Car., at p. 155; *Carlisle et al. v. State*, 32 Ind., at p. 56. The opinion of the Supreme Court in the case of *Ledbetter v. United States*, 170 U. S. 606, is not in conflict with the doctrine established in the State courts.

5. It is not doubted that the rule as to proof of the *corpus delicti* is well established in the criminal law of this country; but it does not mean, as argued by counsel for appellant in his brief, that the *corpus delicti* must be proven beyond a reasonable doubt in order that evidence of defendant's admissions or confessions may be introduced. See *People v. Jones*, 55 Pac. Rep. 698; *Gantling v. State* (Fla., 1899), 26 South. Rep. 737; *Johnson v. Com.*, 81 Ky. 325; *State v. Patterson*, 73 Mo. 695, at p. 712; *Zoldoske v. State*, 82 Wis. 580, at p. 596; *Gray v. Com.*, 101 Pa. St. 380; *United States v. Williams*, 1 Cliff. 15; Best on Presumptions, Sec. 205; Wills' Circumstantial Evidence, 117, 118.

6. It is further contended that the proof fails in not establishing the fact that deceased died within the District of Columbia. While the place of the death of deceased is not material if the fatal blow was struck within the jurisdiction of the court (*United States v. Guiteau*, 1 Mackey, 498, at pp. 526 to 545), yet the proof is complete that deceased died at the Columbian Hospital, in this city. See *People v. Jachne*, 103 N. Y. 182, at p. 199.

7. Complaint is made of the first instruction given to the jury at the request of the Government, with the explanation thereof. This instruction, together with the explanation, are fully justified by the language of the Supreme Court in the case of *Pointer v. United States*, 151 U. S. 396.

8. It is contended that the court erred in rejecting the nineteenth instruction requested by the defendant in regard to the intoxication of appellant. It is understood that he con-

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cedes that, in so far as said instruction was offered for the purpose of securing from the jury a qualified verdict on account of the intoxication of appellant, any error which may have been made in refusing it for that purpose is tolled by the fact that appellant was convicted only of manslaughter, but the instruction as drawn is undoubtedly contrary to the doctrine laid down by this court in the case of *Harris v. United States*, 8 App. D. C. 20.

Mr. Justice SHEPARD delivered the opinion of the Court:

1. The first assignment of error is founded on the objections set out in the overruled motion to quash the indictment. These are stated in full above and are substantially that: There is no record showing that a court was organized at the April term, 1900, or the presence of any officer but the presiding judge on the first, or any subsequent day of the April term; the record does not show that the said court was held at the place designated by law for holding said court; the record does not show that a grand jury was duly and legally organized at said April term; or where the court was sitting at the time; or that the indictment was returned by a legally constituted grand jury; the record does not show that the indictment was presented with the concurrence of at least twelve grand jurors.

There was no plea in abatement, and the motion to quash contained no allegation that, as a matter of fact, there had been no grand jury lawfully empaneled, or no lawful presentment of the indictment. The objection was confined to the suggestion that the recorded minutes of the trial court did not disclose these necessary facts with technically sufficient precision.

The minutes referred to were made by the direction, and were under the eye, of the justice presiding at the trial, and had he not been satisfied of their sufficiency, he had the power, and presumably would have exercised it, to amend them according to the facts that were necessarily within his own actual knowledge. Rule V of this court requires that

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the transcript of the proceedings prepared for appeal shall show in the caption nothing more than the title of the case, the names of the parties in full, and the time of the commencement of the suit or proceeding; and that has been conformed to. Consequently there is nothing in the record before us by which to test the sufficiency of the actual entries of the minutes, either in form or substance, beyond the indictment itself with its recitals and indorsements, and the recital of its presentation in open court on a day of the April term. The transcript containing a formal indictment duly filed in open court in regular term, raises the presumption of regularity in all the proceedings prior thereto, which must continue until rebutted by facts and conditions properly presented in a bill of exceptions.

The bill of exceptions contains nothing more than the motion to quash, the action overruling it and the reservation of an exception thereto. Turning to the recitals of the motion itself and accepting the facts stated therein as true, together with all reasonable deductions therefrom, we cannot find that the court erred in overruling it.

The Supreme Court of the District is a court of general jurisdiction, and its terms are fixed by law, of which we are bound to take notice; and it is not necessary to the legality of the session of its several branches that the minutes should recite the appearance of the clerk and marshal at the opening of the term, or that the sitting was in the District and in the building designated for the purpose. Regularity in these respects is necessarily presumed. It appears from the recitals of the motion that a grand jury was empaneled at the April term; that a foreman was duly appointed, and that an indictment in due form was returned in open court indorsed, "a true bill," over the signature of the foreman. From these it must be presumed that the grand jury empaneled was the grand jury required by the Constitution and the law, and that the true bill returned in open court was concurred in by the requisite number. That the foreman's name, as written, was W. H. H. Cissel instead of William H. H. Cissel, as recited in the minutes,

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is a fact of no consequence. In our opinion, the record shows, substantially, all that is required to sustain a conviction in an appellate court: A formal indictment presented and filed as a true bill; an arraignment and plea; trial, verdict and sentence. *Pointer v. United States*, 151 U. S. 396, 418, 419; *Crain v. United States*, 162 U. S. 625.

2. The eleventh and twelfth specifications of the motion to quash attack the sufficiency of the indictment upon the following grounds, substantially: 1st. It does not set forth "the estate, or degree or mystery" of the defendant; 2d. It does not aver "the town, hamlet or place or county in which the defendant was conversant."

These are founded on the requirements of the ancient English statute of 1 Hen. V, Ch. 5, (A. D. 1413) which reads as follows:

"That in every original writ of actions personals, appeals, and indictments, and in which the exigent shall be awarded in the names of the defendants in such writs original, appeals and indictments, additions shall be made of their estate or degree, or mystery, and of the towns, or hamlets, or places, and counties, of which they were or be, or in which they be or were conversant; (2) and if by process upon the said original writs, appeals, or indictments, in which the said additions be omitted, any utlagaries be pronounced, that they be void, frustrate and holden for none; (3) and that before the utlagaries pronounced, the said writs and indictments shall be abated by the exception of the party, wherein the same the said additions be omitted. (4) Provided always, that though the said writs of additions personals be not according to the records and deeds, by the surplusage of the additions aforesaid, that for that cause they be not abated; (5) and that the clerks of the chancery, under whose names such writs shall go forth written, shall not leave out, or make omission of the said additions as is aforesaid, upon pain to be punished and to pay a fine to the king by the discretion of the chancellor; (6) and this ordinance shall begin to hold place at the suit of the party, from the feast of St. Michael next ensuing forward."

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 The contention that this statute was in force in Maryland at the time of the cession, and, as such, was continued in force by the terms of the act of Congress of February 27, 1801, has some support, it must be admitted, in the authorities cited by counsel.

It appears in full in the Compiled Statutes of the District (p. 460, Sec. 83); and in 1790, the General Court of Maryland is reported as having quashed an indictment because of the omission of the additions therein required. *State v. Hughes*, 2 H. & McH. 322. Bishop says, however, that in a more extended report of that case by Kilty, it is said: "A reference was made by one of the judges to several acts of assembly in which the process of outlawry was mentioned." 1 Bishop's Crim. Proc., Sec. 674, note 2.

The question does not appear to have again arisen, and the statute was expressly repealed by act of legislature as late as 1852. See statement in *Hammond v. State*, 14 Md. 135.

Its existence was recognized also in the following States: Pennsylvania, New Hampshire, Maine and Virginia. *Report of Judges*, 3 Binney, 595, 614; *Com. v. Jackson*, 2 Grant's Cas. 262; *State v. Moore*, 14 N. H. 451; *State v. Bishop*, 15 Me. 122; *State v. Nelson*, 29 Me. 329, 334 (stating statutory change); *Com. v. Sims*, 2 Va. Cas. 374; *Com. v. Clark*, Idem, 401. In the last case decided in Virginia (A. D. 1823) it was said that the statute had been re-enacted in that State February 26, 1819, except in so far as the estate or degree "are inconsistent with the principles of our government." In Kentucky it was re-enacted in 1796, but is "expressly confined to indictments in which the *exigent* may be awarded and outlawries pronounced." *Com. v. Rucker*, 14 B. Monroe, 184. And for that reason its application to the indictment in that case was denied.

Despite these supporting authorities, we cannot agree that this statute was in force and effect in Maryland, after the Revolution, in controlling the forms of indictments; and that, as such, it was continued in force in the District of Columbia by the act of Congress of February 27, 1801.

The statute was passed in mitigation of some of the evils

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of the cruel process of outlawry that, at certain stages of proceedings, civil and criminal, followed the failure of the defendant to appear, and was enacted in answer to petitions that no man might be outlawed without his sur-name, and the name of his town and county.

The object of the statute was to enable the person against whom the process ran, to be identified and thus prevent oppressions that had formerly resulted from want of certainty of description. 2 Reeves' Eng. Law (Finlason), 519, 520; 4 Bl. Com. 306. See also *Morgan v. State*, 15 Ala. 556, 559; *Com. v. Rucker*, 14 B. Monroe, 184; *State v. McDowell*, 6 Blackford, 49.

The *exigent* was the first process in outlawry and the statute, it will be observed, is limited to cases "in which the *exigent* shall be awarded."

Founded, then, on distinctions of estate and condition — *i. e.*, rank in life — and intended to operate only where outlawry might be declared, the life of the statute passed with the sudden subversion of rank and the gradual disappearance of the barbaric process of outlawry. No conditions whatever remained to furnish foundations for its application or operation. 1 Bishop's Crim. Proc., Sec. 673; *State v. McDowell*, 6 Blackford, 49; *Com. v. Rucker*, 14 B. Monroe, 184; *Morgan v. State*, 15 Ala. 556, 559.

It is possible, also, that some reasons for the requirement, in ancient indictments, of the additions of estate or condition, and mystery (*i. e.*, trade or occupation), inhered in the special privileges of barons and knights to be arraigned by and before their peers, as well as in the benefit of clergy that was extended to certain ranks and other privileged persons.

It is proper to add, that, if we were inclined to the view that the aforesaid statute was in force in this District, because not expressly repealed, we would, nevertheless, sustain the indictment, for the reason that we could not agree to the contention that the averment of the addition was made, and must, therefore, necessarily, continue to be regarded as, matter of substance and by no means of form. Being

matter of form, it would be cured by the provisions of section 1025, R. S.

3. The last objection to the indictment is to the want of particularity in the allegation of the place of the commission of the crime. It alleges that the offense was committed in the District and in a certain house situated therein, but omits the precise locality of the house. The contention is that the location of the said house should have been averred, if not by square, street and number, at least by situation in the county or in the city of Washington, and by section thereof. Considering the nature of the offense charged in the indictment we see no reason for such particularity of statement. The allegation of place is necessary only as fixing the venue. It has no relation to the fact and constitutes no part of the description of the offense. In England, and anciently, the averment of the particular hamlet, township or place in the county was important because in the early days of jury trial, the jurors, for reasons directly opposed to those controlling the modern practice, were always summoned from the vicinage.

In and before Blackstone's time, the allegation of the particular township or place had become immaterial, that is to say, a mistake therein, like that in date, was immaterial, provided the place was within the jurisdiction of the court. 4 Blackst. Com. 306.

In this country it has been generally held that an indictment is sufficient which avers the commission of the offense in the jurisdiction of the court without specification of the particular locality. See cases cited on the brief of the District Attorney, and in *Ledbetter v. United States*, 170 U. S., at pp. 613, 614.

Certain language in the opinion in the last-mentioned case is relied on by counsel for the appellant, as showing the rejection, by the Supreme Court of the United States, of the doctrine above stated. The indictment was for carrying on the business of a retail dealer in liquors without license, "in the County of Appanoose in the Southern District of Iowa and within the jurisdiction of this court."

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Objection to the want of particularity of place was not taken by motion to quash, or on the trial, but by motion in arrest of judgment, and the court held that it was properly overruled. In the opinion, it was said: "Properly speaking, the indictment should state not only the county, but the township, city or other municipality within which the crime is alleged to have been committed. But the authorities in this particular are much less rigid than formerly." Then, after referring to the reasons which in England dictated such particularity until abolished by statute, as well as to the American cases on the point, the opinion concluded in these words: "We do not wish to be understood as approving the practice that was pursued in this case, or even as holding that this indictment might not have been open to special demurrer for insufficiency as to the allegations of time and place, but upon motion in arrest of judgment we think it is sufficient."

This intimation of dissent from the doctrine of the cases that had been cited, if such it can be called, must necessarily be viewed in the light of the particular case under consideration. The carrying on of the business charged, implied continuing acts, for a time at least, at some certain place of business. Cases of the kind might be imagined where it would be unfair to charge the commission of the offense in a great county merely, when the particular place implicated by the evidence on which the bill was found, must necessarily be within the knowledge of the grand jury.

Situations might be imagined as likely to occur in some such classes of cases that would, by analogy, bring them within the rule applicable to those offenses where time and locality may both, in greater or less degree, enter into the description.

In this case, the locality of the house had no relation whatever to the offense charged, and failure to aver it could by no possibility have misled the defendant or prejudiced his defense.

4. The next error in order of assignment asserts the insufficiency of the evidence to show either that the deceased

died in the District of Columbia, or that her death was the result of a blow inflicted by the accused.

(1) There was direct proof that the injuries of deceased were received in the District of Columbia, and that she died in the Columbian Hospital. Former evidence of her removal to that hospital, before death, showed it to be situated in the District.

The consideration of this point, it may be added, is not intended to convey an intimation that the offense would be either complete or incomplete, in our opinion, without proof of the death, as well as the infliction of the injury resulting therein, in the District of Columbia. In our view of the testimony, that question could not arise.

(2) A brief statement of the general purport of the evidence, relied on by both prosecution and defense, has been given above, and we think it unnecessary to review it here. It is sufficient to say that there was evidence tending to establish the necessary facts from which, if believed by them to be true beyond a reasonable doubt, the jury had a right to find that a blow unlawfully given by the accused was the proximate cause of the death of the deceased.

We have nothing to do with the credibility of the witnesses and the respective weight of their testimony. These were passed upon by the jury and their verdict was approved by the justice who presided at the trial.

We are of the opinion that the court did not err in refusing to direct a verdict of not guilty.

5. We come now, in conclusion, to examine certain other exceptions taken to the action of the court in giving and refusing instructions to the jury upon the law applicable to the evidence submitted for their consideration.

(1) The court instructed the jury that it was not necessary for the Government to prove a motive; but that absence of proof of motive might be considered as a circumstance in defendant's favor. In this there was no error. *Pointer v. United States*, 151 U. S. 396, 413, 414.

(2) Nor was it error to refuse a special instruction to the effect that, if it were probable the deceased came to her

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death from any other cause whatever than from violence inflicted upon her by defendant, they should find him not guilty; because in addition to a general charge showing the necessity of proof beyond a reasonable doubt, the court has also given nine elaborate special instructions on the subject, at request of defendant, which more than covered every phase of the case. The following is one of these: "The jury are further instructed that if after a full, careful consideration of all the evidence introduced before them that the death of Mrs. Betty L. Wren may be accounted for on any other hypothesis whatever, than that she came to her death as a result of injuries inflicted by the defendant, then it is the duty of the jury to acquit the defendant." The court was more than liberal in respect of the right of the accused to the benefit of his presumption of innocence, until removed by evidence beyond all reasonable doubt. *Wallace v. United States*, Present Term.

(3) The last special prayer refused reads as follows:

"19. The court instructs the jury that while as a matter of law voluntary drunkenness is not within itself a defense for a crime committed, and yet if the jury in this case should be satisfied from the evidence that the defendant did strike the deceased, Bettie L. Wren, while in a state of intoxication, they are authorized to take the fact of his intoxication into consideration in determining the character of the crime committed and the grade of punishment which should be inflicted, as explained in other instructions given by the court in this case."

The contention is that this prayer was a proper instruction to the jury upon the following grounds.—First: The jury had a right to take into consideration the intoxication of the accused in the exercise of their power, by recommendation in their verdict, to reduce the sentence for murder from death to imprisonment for life.

Second: That intoxication may be considered in determining the character of the crime committed.

Were the soundness of the first ground conceded, the

error would be harmless, because the accused was not convicted of murder, but of manslaughter only.

The second ground is inadmissible. We have heretofore determined, upon full consideration, that "voluntary intoxication is neither an excuse nor a palliation for crime." *Harris v. United States*, 8 App. D. C. 20, 26.

Having found no error in the proceedings on the trial the judgment will be affirmed. It is so ordered.

Affirmed.

BLAGDEN

v.

THE UNITED STATES, TO THE USE OF PREINKERT.

BONDS, ACTIONS ON; PRINCIPAL AND SURETY; PLEADING AND PRACTICE.

1. The plaintiff, in a suit on an executor's bond, against the executor and his sureties, by taking a judgment by default against the executor, does not thereby release the sureties from further liability, although in the declaration it is alleged that the bond is joint while, in fact, it is joint and several; *construing* Sec. 827, R. S. D. C.
2. Objections by one of several defendants in an action on a bond against an executor and his sureties, that the declaration fails to state that the executor ever entered upon his office; or that the bond was ever delivered or approved by the Orphans' Court; or that assets ever came into the executor's hands wherewith to pay the claim of the plaintiff, or that there were any demand and refusal to pay, or that the Orphans' Court ever ordered the executor to pay — are immaterial, and, at most, constitute matters of defense which, if true, should be pleaded.

No. 1085. Submitted May 21, 1901. Decided June 4, 1901.

HEARING on an appeal (specially allowed) by one of several defendants from an interlocutory judgment of the Supreme Court of the District of Columbia, sustaining a demurrer to a plea *puis darrein continuance*, in an action on an executor's bond against the principal and sureties. *Affirmed.*

D. C.]

Statement of the Case.

The Court in its opinion stated the case as follows:

This is a suit on an executor's bond given in the orphans' court branch of the Supreme Court of the District by John Taylor, as executor of James Taylor, deceased, with the appellant, Thomas Blagden, and George W. White as sureties, conditioned for the faithful performance of his duties by said executor. The suit was instituted in the name of the United States, to which the bond was executed, as plaintiff, for the use of four infant children, suing by their guardians, against the executor and his two sureties. The declaration, after stating the execution of the bond, and its condition, and making *profert* thereof, proceeded to allege as the breach of the condition the failure of the executor to pay to the infant plaintiffs the sum of \$466.99, shown by his second and final account of his executorship, duly approved and passed by the court, to be due to each one of the said infant plaintiffs as his or her distributive share of the estate of the aforesaid James Taylor, deceased, or the sum of \$1,867.99 in all, subject to some credits aggregating \$286.90. It alleged the bond to have been executed by Taylor, as principal, and by Blagden and White, as sureties; but it did not in express terms state whether it was a joint, or a joint and several, or a several bond.

Whether the defendant White was served with process, does not appear from the record. Taylor and Blagden were served with process. Blagden pleaded, and Taylor made default; and judgment final by default was rendered against the latter. Thereupon Blagden filed a plea *puis darrein continuance* to the effect that the judgment against Taylor operated as a release of himself from liability on the bond; and he filed as part of his plea a copy of the bond, from which it appeared that this latter was in terms a joint and several bond.

The plea was demurred to by the plaintiff, and the demurrer was sustained; and from the order sustaining the demurrer the defendant Blagden has been allowed a special appeal to this court.

Mr. Wm. Stone Abert and *Mr. R. Ross Perry* for the appellant.

Mr. Ralph P. Barnard and *Mr. Guy H. Johnson* for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

As is apparent from the appellant's plea *puis darrein continuance*, his contention is that the plaintiffs, by taking a judgment against the principal, John Taylor, thereby released his sureties from further liability; and that the case is not governed by section 827 of the Revised Statutes of the United States for the District of Columbia, which, it is claimed, relates to obligations exclusively joint and to obligations exclusively several, but not to obligations both joint and several, which are assumed to be left as at common law, and in which it is further assumed that no judgment can be entered at common law against one of the joint obligors without thereby releasing the others.

The section of the Revised Statutes referred to is as follows:

"Where money is payable by two or more persons jointly or severally, as by joint obligors, covenantors, makers, drawers, or indorsers, one action may be sustained and judgment recovered against all or any of the parties by whom the money is payable, at the option of the plaintiff. But an action against one or some of the parties may, while the litigation therein continues, be pleaded in bar of another action against another or others of said parties."

This statute, as was remarked by the Supreme Court of the United States in the case of *Burdette v. Bartlett*, 95 U. S. 637, is not happily expressed, and the words, which have been inserted in it by way of illustration, "like many other intended illuminations, serve but to darken the subject." But the effect of the construction put upon it by the Supreme Court in that case and by this court in the cases of *Harris v. Leonhardt*, 2 App. D. C. 318, and *Young v. Warner*, 6 App. D. C. 433, amply suffices to cover the case now before us.

D. C.]

Opinion of the Court.

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It is conceded by the appellant that a "*joint and several bond*" may be treated by any person entitled to sue thereon either as a joint bond or as a several bond, at his option, the restriction being that it may not be treated as being both at the same time. In other words, in the case of a joint and several bond, all the obligors may be joined as defendants in one suit and one joint judgment may be recovered against them; or several suits may be maintained against the several obligors separately, and separate judgments recovered against each; but no intermediate number may be selected less than the whole for any one suit. And this is the law, with some exceptions. *United States v. Lefler*, 11 Pet. 86; *Mason v. Eldred*, 6 Wall. 231; *Pirie v. Tvedt*, 115 U. S. 41; *Minor v. Mechanics' Bank*, 1 Pet. 46.

Now, if a joint and several bond is treated by the plaintiff as a joint bond, and he has elected to bring suit upon it as a joint bond, it becomes for the purpose of such suit exclusively a joint bond, and the element of severalty is excluded from consideration. The bond, to all legal intents and purposes, becomes merely a joint bond in that suit; and being such, it is covered by the express words of the statute, which confessedly and in terms applies to joint obligations. For the purpose of suit and for the purpose of construction, the word *and*, in the expression "*joint and several*," is the equivalent of the word "or." Bouvier's Law Dictionary, word "Or."

But even at common law, in the absence of a statute, the appellant's contention is unsound. It was decided by the Supreme Court of the United States in the case of *United States v. Lefler*, 11 Pet. 86, that, in a suit against all the joint obligors on a joint and several bond, after judgment has been taken against one by confession, the suit may be continued against the others. Now, there can be no difference in this regard between taking judgment by confession and taking judgment by default. While it is true as a general rule that in a joint suit only a joint judgment is proper, yet when in such a suit the defendants have severed in their pleadings, as they are undoubtedly entitled

to do in all cases, it would be absurd to hold that those pleadings must all eventuate in one joint judgment. But whatever might have been the rule of the common law on this point, we are entirely clear that the bond here sued on is for the purpose of this suit a joint bond, and that, under the express provisions of the statute, several judgments may be recovered upon it.

It was said in the cases of *Harris v. Leonhardt*, 2 App. D. C. 318, 322: "Of course, it is well settled, without the aid of a statute, that, in the case of a joint and several contract, an unsatisfied judgment against one of the promisors is no bar to a subsequent action against the other; and the statute, as we have seen, places a joint contract for the payment of money on the same footing as a several contract, with respect to the right of suit thereon." And again: "The obvious meaning of this statute is to put the right of action on all contracts for the payment of money, whether joint or several, on one and the same footing, and to give to the plaintiff the right to judgment against all the parties bound by such contract."

In our opinion these considerations serve to dispose of the present case.

But the appellant contends further that the demurrer interposed by the appellees to his plea *puis darrein continuance* opens up the whole record, and that the plaintiff's declaration in the cause is fatally defective in six several particulars, which are enumerated as follows: (1) That the bond in question is a joint and several bond, while the statement in the declaration is that of a joint bond; (2) that there is no statement in the declaration that John Taylor ever entered upon the office of executor; (3) that it is not alleged to have been delivered or approved by the orphans' court; (4) that it does not appear that assets came into the executor's hands wherewith to pay the claim of the plaintiffs; (5) that there is no averment of demand and refusal to pay; (6) that it does not appear that there was any order of the orphans' court on the executor to pay.

We do not regard any of these contentions as well founded;

D. C.]

Syllabus.

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and it must be said that they do not seem to be very seriously insisted on, except perhaps the first. But this first contention — that the bond sued on is a joint and several bond, while, as described in the declaration, it would appear to be merely a joint obligation — has already been disposed of by what we have said in regard to the right to maintain this suit under the statute. No doubt it would have been the better practice to have fully described the bond as a joint and several obligation; but in view of what we have already said, this cannot be regarded as a fatal variance. The declaration may well be amended in this regard when the cause goes back for further proceedings.

As to the other objections to the declaration it is sufficient to say that we do not regard them as material, or as sustained by the authorities cited in support of them. Rather are they contravened by those authorities. At the utmost, they suggest matters which, if true in point of fact, would, under our present simplified system of pleading, constitute points of defense by a defendant rather than of anticipation by plaintiff. We cannot regard them as of importance in the present connection.

It is our opinion that the order of the Supreme Court of the District, from which this appeal has been allowed, should be *affirmed, with costs; and that the cause should be remanded to that court for further proceedings therein according to law. And it is so ordered.*

OETTINGER v. DISTRICT OF COLUMBIA.

DEDICATION; ESTOPPEL.

Where the owner of land agrees with an adjoining owner to dedicate a portion of it for use as a public street, and the latter records a plat showing such dedication, and the municipal authorities enter upon the part so dedicated and grade it, such dedication thereby becomes

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irrevocable and the first owner is estopped to thereafter disclaim the dedication and resume exclusive adverse possession; *following* *Lansburgh v. District of Columbia*, 8 App. D. C. 10; *District of Columbia v. Robinson*, 14 id. 512; S. C., 180 U. S. 92.

No. 1016. Submitted May 22, 1901. Decided June 4, 1901.

HEARING on an appeal by the complainant from a decree of the Supreme Court of the District of Columbia dismissing a bill in equity for an injunction and to remove an alleged cloud upon the title of certain real estate. *Affirmed*.

The facts are sufficiently stated in the opinion.

Messrs. Padgett & Forrest for the appellant.

Mr. Andrew B. Duvall, Attorney for the District of Columbia, and *Mr. Clarence A. Brandenburg*, Assistant Attorney, for the appellee.

Mr. Justice SHEPARD delivered the opinion of the Court:

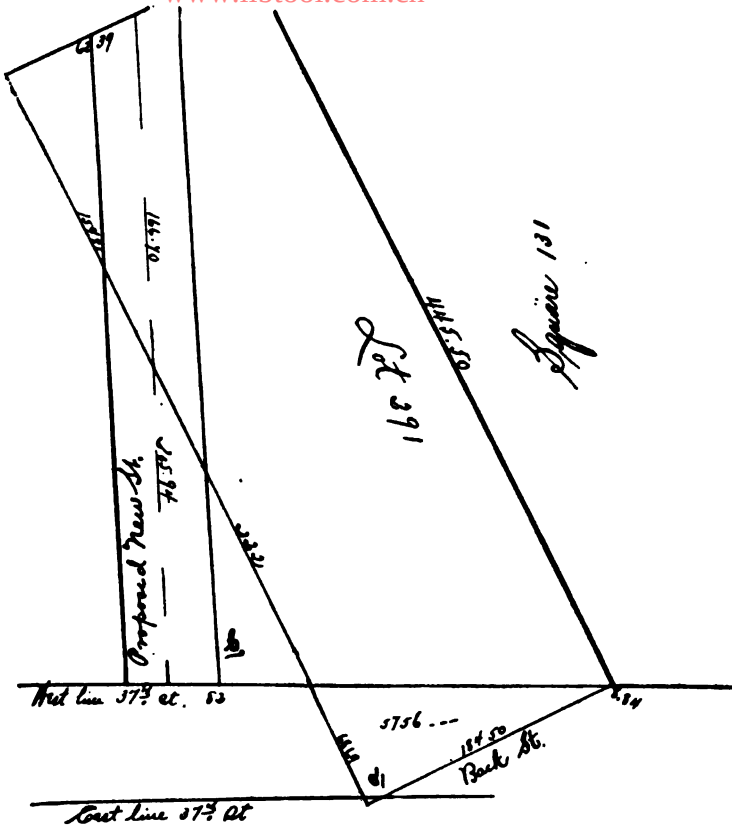
This is an appeal from a decree dismissing the bill of Henry Oettinger, filed August 20, 1897, against the District of Columbia to enjoin it from interfering with the complainant in the use of certain property that is claimed by the defendant as a public street; and to remove a cloud upon the title raised by the record of a map including said property in Thirty-seventh street of the City of Washington.

It appears that Lot 291 was conveyed, on January 17, 1889, to complainant and William H. Manogue as tenants in common — three-fourths to complainant and one-fourth to Manogue. On December 4, 1896, Manogue conveyed his interest to complainant.

The plat referred to in the bill was filed for record by Frederick W. Huidekoper who was the owner of the land south of Lot 291. It shows the location of Lot 291 with the proposed extension of Thirty-seventh street and the new street extending west therefrom. It is here copied as shown in the record with the addition of letters designating certain parts that are referred to in the testimony.

D. C.]

Opinion of the Court.

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'Complainant's Exhibit'

76 10/16 }
 Oettinger } p. 5
 Dist. of Col. } 'A'

The answer of the District set up a dedication of the triangle *a* by the owners, Oettinger and Manogue, by agreement with Frederick W. Huidekoper, and the acceptance of the same by work done in grading and improving the extension of Thirty-seventh street north.

The facts of dedication as alleged were supported by the testimony of said Huidekoper. He said that he owned the land south of Lot 291, and also certain land a short distance north of the same in and surrounding the proposed extension of Thirty-seventh street. In 1889 he opened, but without express dedication, Thirty-seventh street south of Lot 291. Whilst so engaged, he had frequent interviews with W. H. Manogue, who was a lawyer, looking to the extension of the street across the end of Lot 291 as shown in the plat. He finally agreed with Manogue that, in consideration of the dedication of triangle *a* of Lot 291, he would dedicate the street south, and also the proposed new street to its intersection with the line of 291, and convey to the owners of 291 the title to triangle *b*. The ground was surveyed and the said plat made in accordance therewith. This gave the other parties 38 feet additional front on Thirty-seventh street and a frontage of about 400 feet on the proposed new street, along which Manogue talked of building some small houses. Witness then publicly entered and removed the fence and an old stable on triangle *a* and did considerable work in grading the lot in 1890, 1891 and 1893. At the same time the other parties took possession of and fenced triangle *b*. Witness subsequently subscribed the plat expecting Manogue and his cotenant to do the same, and offered to make the deed to triangle *b*, a memorandum of which he sent to Manogue. In 1892 or 1893, the District authorities did some work in gravelling Thirty-seventh street and the same was afterwards (say after 1895) extended north across other lands, some of which were acquired by condemnation.

Before and at the time of the institution of the suit, the District was engaged in putting gutters across triangle *a* in the lines of Thirty-seventh street.

Manogue, as a witness for complainant, admitted having frequent conversations with Huidekoper, but denied coming to the agreement testified to by him. He also said that Oettinger refused to enter into the arrangement and always refused to dedicate the land.

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Oettinger testified that he refused to dedicate the land and had never agreed to any arrangement and had not authorized his tenant, whose house stood near the line of the proposed dedication, to inclose the triangle *b*.

He showed by his tax receipts that he had paid taxes on the whole of Lot 291 without deduction of the part included in the street. He lived about half a mile from the spot and visited it three or four times a month.

Upon a lengthy cross-examination, he and Manogue were compelled to admit that they knew of the removal of the fence and house on triangle *a* and that work had been done thereon in grading and opening the street. No attempt was made to prevent the occupation of the street.

Huidekoper's statement of the understanding with Manogue, who claimed to represent all the interests in the land, is corroborated by certain letters written by him to Manogue under the following dates: December 9, 1892; March 22 and May 30, 1893. Both of the latter express the desire to close the matter by making the deeds of dedication and conveyance. No answers were made to these. Moreover, Huidekoper's action in entering upon the lands, making the plat, and expending considerable sums of money in grading the street, afford exceedingly strong support to his statement of the agreement with Manogue and his belief that the latter had been authorized to act for the complainant. In addition, he was active in procuring appropriations from Congress for the northern extension and improvement of Thirty-seventh street. Complainant knew that some negotiations were going on between Manogue and Huidekoper for the opening of the street, though he denies assenting to any arrangement. He knew, however, that his land had been entered upon, his stable and fence removed, and the street graded, and yet made no objection until long after the District authorities had accepted the supposed dedication by improving the street for travel. He was bound also to know that his tenant had fenced the Huidekoper land (triangle *b*) and made a garden and chicken yard of it. His first protest and claim for compensation were made in March, 1897.

In the meantime, it appears that the District had been compelled to pay for some land in the further extension of Thirty-seventh street. It was this, apparently, that roused the complainant to action, as will appear in the following extract from his deposition:

"Q. You knew they were going to open a street through your lot? A. No, sir.

"Q. Didn't you know they were opening up Thirty-seventh (37th) street through your lot? A. I knew they were widening Thirty-seventh (37th) street; yes, sir.

"Q. You didn't know anything about it until it was all done? A. I made my application also when I heard the other men had been paid.

"Q. You didn't claim anything until you heard the other men were paid? A. Yes, sir.

"Q. You thought that if there was any money going on around about it you ought to have some? A. Yes, sir."

Great stress is laid, on the argument on behalf of the complainant, upon the fact testified to by him and Manogue that there had been no direct communication between him and Huidekoper, and that when Manogue reported propositions of Huidekoper he had always expressed his dissent to Manogue. The question of dedication, however, does not turn upon what he now says was his secret intention at the time; but upon the intention disclosed to Huidekoper and the public authorities by his conduct at the time. *Morgan v. Railroad Co.*, 96 U. S. 716, 723.

The rules of law governing the dedication and acceptance of private property for permanent use as a public highway or street, and the estoppel thereby raised against the owner's subsequent disclaimer and resumption of exclusive adverse possession, have been fully considered and reported in cases heretofore decided. *Lansburgh v. D. C.*, 8 App. D. C. 10; *D. C. v. Robinson*, 14 App. D. C. 512, 544; *S. C.*, 180 U. S. 92.

And there is nothing exceptional in the facts of this case that requires their restatement, or special explanation of their applicability.

D. C.]

Syllabus.

Tested by those rules, we are of the opinion that the facts and circumstances proved are sufficient to constitute a dedication of the complainant's land to the public use as a street, that has become irrevocable through the acceptance shown by the acts of the public authorities. That no deed has been executed and delivered by Huidekoper conveying the title to triangle *b* in accordance with his proposition to Manogue, is immaterial. He has offered to do so and it is to be presumed that he will whenever complainant shall indicate his willingness to accept it.

Should he refuse, complainant, through his possession of the land and final performance of the agreement, will have ample remedy.

There was no error in the decree and it will be affirmed, with costs.

Affirmed.

FRISBIE v. COWEN.

SURFACE WATERS; DITCHES; DRAINAGE; RAILROADS.

1. A railroad company has no right to concentrate or accumulate surface water in ditches along the tracks or bed of its road and by cutaways or outlets turn it upon the lower adjoining or adjacent lands to the injury of proprietors thereof.
2. In the absence of a prescriptive right of drainage, a railroad company has no right to utilize a depression or gully, not constituting a natural watercourse, in the lower land of an adjoining owner, for the purpose of receiving water from a ditch along its tracks; and such adjoining owner has the right to fill up and level his land; and if, in so doing, it becomes flooded and injured from the flow of water from the ditch, is entitled to recover damages from the railroad company.

No. 1062. Submitted May 23, 1901. Decided June 4, 1901.

HEARING on an appeal by the plaintiffs from a judgment of the Supreme Court of the District of Columbia entered upon the verdict of a jury in an action to recover damages

for an alleged wrongful discharge of water on the plaintiffs' land from an artificial ditch draining the defendant's railroad tracks. *Reversed.*

The facts are sufficiently stated in the opinion.

Mr. Charles A. Keigwin and Mr. C. Albert White for the appellants.

Mr. G. E. Hamilton and Mr. M. J. Colbert for the appellees:

1. There was no testimony in the case, and there is absolutely no evidence in the record to indicate that anything other than the house was damaged by the flow of surface water. There was no evidence that the natural drain across the lot ever overflowed, and the refusal to charge the jury upon evidence, which the court said was not in the case, was clearly no error. The court would have been in error if it had complied with appellant's request in that behalf. *Bryan v. United States*, 1 Black, 140; *W. & G. RR. Co. v. Gladmon*, 15 Wall. 401; *Marshall v. Haney*, 4 Md. 498; 11 Encyc. of Pl. & Pr. 170. The defendants filed a plea of not guilty, and before the jury could consider the question of damages at all they had first to determine whether or not the defendants were guilty of any negligence which would entitle appellants to a verdict. The jury decided that the defendants were not guilty of negligence, and, therefore, manifestly never reached the point of considering what damages had been suffered by appellants. It is immaterial, therefore, whether the court below was right or wrong in its charge to the jury upon the question of damages. *Manning v. The Union Transfer Co.*, 18 D. C. 214; *Herbert v. Northampton*, 152 Mass. 266.

2. The court below instructed the jury, substantially, that if the plaintiffs by their own conduct, and without the intervention of any act on the part of the defendants, so graded their lot as to make it a water-shed, and thereby suffer dam-

D. C.]

Argument of Counsel.

age, they are responsible for their own loss and cannot charge the defendants. Applying this instruction to the facts in this case it would seem to us that a fairer instruction could not have been given. It expresses in a somewhat changed form the reason underlying the law of contributory negligence, which is recognized and enforced by all the courts in this country.

3. Appellants have entirely misconceived the theory of appellees' defense. It is true that appellees do not claim a grant or prescriptive right entitling them to discharge surface water indirectly upon appellants' property, but on every other question in the case there was direct conflict in the testimony. Appellees denied all responsibility for the water being cast on appellants' property; denied that they had constructed the cutaway ditch leading to appellants' property, and distinctly claimed that the surface water left the railroad drain opposite their lot in its attempt to seek its level, and that it followed a natural drain in reaching their lot and in crossing it to the artificial drain on the opposite side of the lot. The question then arises as to what was the duty of appellees with regard to this surface water. There has been no adjudication in this jurisdiction on this question, and from an examination of the cases collected in the *Encyclopædia of Law*, vol. 24, p. 907, it would appear that the courts are about equally divided between the civil-law and the common-law rules. The civil-law rule seems to be that where one of contiguous estates is lower than the other, the lower estate must necessarily be subject to the flow of water from the upper one; and the owner of the lower one cannot erect embankments or other structures to stop the flow from the upper estate. Nor can the owner of the upper estate collect the water in one channel, which before flowed in several channels, and discharge it upon the lower estate to its damage.

Under the common-law rule, surface water is treated as a common enemy, to be gotten rid of in the best manner that good husbandry may suggest, and if in the improvement of our property surface water is caused to stand on adjacent lands in unusual quantities, or to pass over it in greater

quantities and in other directions than it was accustomed to flow, it is *damnum absque injuria*. 24 Encyc. of Law, 917; *Gannon v. Hardagon*, 10 Allen, 106; *Munkres v. Kansas City, etc., Railroad Co.*, 72 Mo. 514; *McCormick v. Same*, 57 Mo. 433; *Dillon on Mun. Corp.*, Sec. 798; *Pathke v. Gardner*, 134 Mass. 14; *Cassidy v. Old Colony Railway Co.*, 141 Mass. 174; *Morrissey v. Railroad Co.*, 38 Neb. 406; *Collier v. Railroad Co.*, 48 Mo. App. 398; *Railroad Co. v. Riley*, 33 Kans. 374; *Morrison v. Railroad Co.*, 67 Me. 355; *Gross v. Tompasas*, 74 Tex. 195; *Brown v. Railroad Co.*, 55 N. W. Rep. 123, and *Jordan v. St. Paul, etc., Railroad Co.*, 42 Minn. 172.

We agree with counsel for appellants that the owner of upper lands cannot collect the waters of his estate into a ditch or drain, and discharge it in a volume on the lower land to its injury, and it is to be noted that the trial justice so charged the jury. The instruction to the jury is in exact accord with the authorities, and stated the law as broadly as they are entitled to have it stated. Appellees, under the general issue, contradicted each and every material allegation on the part of the plaintiffs, and under such circumstances it was proper to submit the case to the jury. *Hughes v. Anderson*, 68 Ala. 280; *Meixell v. Morgan*, 149 Pa. St. 415.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This action was brought by the appellants, Annie T. Frisbie and William B. Frisbie, against the appellees, John K. Cowen and Oscar G. Murray, as receivers of the Baltimore and Ohio Railroad Company, to recover damages for an alleged injury to property occasioned by the wrongful discharge of water from an artificial ditch draining the tracks and roadway of the railroad company.

It is shown, both by allegation and proof, that the appellants owned a piece or lot of ground contiguous to the line of the railroad, and several feet lower than the tracks, and upon which lot there is a house. Many years ago the rail-

D. C.]

Opinion of the Court.

road company constructed within the limits of its right of way the ditch in question, which runs parallel with the tracks of the road for a distance of about three-quarters of a mile, is two or three feet deep and three or four feet wide, and not only drains the company's property, but collects the surface water flowing from adjacent lands upon the tracks of the road. In the year 1896 or 1897 this ditch, formerly of smaller dimensions, was enlarged to its present size; and about the same time the company either constructed or enlarged an outlet for it, which outlet runs at a right angle to the general course of the ditch alongside the track, and runs in the direction of the house on the land of the plaintiffs, and extends to the boundary of their lot and there empties its contents upon their land.

The defendants pleaded the general issue of not guilty, and at the trial the plaintiffs gave evidence to show, that in the year 1897, and after the construction or enlargement of the ditch along the track of the road, and the construction or enlargement of the outlet thereof, a great volume of water was discharged from the ditch through the outlet upon the lot of the plaintiffs after every rain, so that the ground was made more wet and muddy than it had theretofore been, and the lower story of the house on the lot was often overflowed to the depth of sixteen or eighteen inches, and other damage was done to the house and the lot. That by reason of the premises the lower floor of the house became uninhabitable, and the house itself was damaged to such an extent that it would cost about \$460 to put it in repair. That the plaintiffs had, in or about the month of December, 1898, constructed a dam at the mouth of the outlet, thereby stopping the discharge of water from the ditch, since which time the premises had been uninjured by water.

The defendants then gave evidence to show that the ditch alongside the track of the roadbed had for many years existed upon the company's right of way, and that the servants of the company had always been in the habit of cleaning it out and keeping it open, but that it had not been in recent years enlarged, and that the outlet leading to the plaintiffs' lot

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had likewise existed for many years, and had not been enlarged; that the said ditch and the said outlet thereof were so constructed as to discharge the water therein collected into a natural depression or gully, which extended from the mouth of the outlet across the lot of the plaintiffs and emptied into an artificial drain on the opposite side of the lot, through which the water flowing across the lot was carried to a culvert some distance beyond; that when the plaintiffs dammed the outlet of the ditch the water therein overflowed the tracks, and the defendants found it necessary to extend the ditch about 200 yards within their right of way so as to make it discharge into a stream that runs under the tracks; that the ground in the plaintiffs' lot in the years 1892, 1893, 1894 and 1895, had been wet and muddy, but that the house in those years was dry and habitable. That in the year 1896 or 1897, water from the ditch would flow against the house at times of hard rains; but that, in the year 1895 or 1896, the plaintiffs graded their lot so as to make the surface level, and filled up the depression or gully running across it, and that by reason of this change the water coming from the ditch of the railroad company, which had theretofore run across the lot, flowed and spread over the entire lot.

This was in substance the entire evidence as produced plaintiffs and defendants; and upon this evidence the plaintiffs prayed the court to direct the jury, that they must return a verdict for the plaintiffs in such sum as would fairly and fully compensate them for the damage done to their property by the increased flow of water upon their land caused by the ditch upon the land of the railroad company; and in fixing the amount of the verdict for the plaintiffs the jury should allow a sum which would compensate the plaintiffs for the cost of such repair as might be found to have been made necessary by the increased flow of water caused by the ditch on the land of the railroad company, and such additional amount as might be found to be necessary to remedy the damage due to the same cause. This request by the plaintiffs was refused by the court, and to which refusal the plaintiffs excepted.

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The court then proceeded to instruct the jury upon the whole case, and after stating the case and the manner of its presentation, among other things, said to the jury: "If, in this case, the plaintiffs have satisfied you by a preponderance of the evidence that the defendants were the owners of this strip of ground on which the railway was built (and I believe as to that there does not seem to be any controversy), and that a ditch was constructed by the railway company along the railway which gathered up water which fell upon the right of way of the railway company, or which may have fallen upon adjoining premises and found its way into this ditch, and that the water ran down to a point opposite to the plaintiffs' land; that they also constructed a cutaway ditch and through that turned a stream of water onto the land of the plaintiffs in such a way as that this water ran down to and onto and into the house and into the basement of it, and thereby injured the house and otherwise injured the plaintiffs, the plaintiffs would be entitled to recover such damages as the evidence may show you they have suffered in consequence of such water coming from a railroad having been turned onto the land of the plaintiffs and onto the house owned and constructed by them."

This part of the instruction, so far as it goes, is right enough, and it has not been excepted to; but the court proceeds, in the next paragraph, to qualify the instruction thus given, by saying to the jury: "But if the water that came from the railroad ditch through the ditch cut at right angles leading onto the land of the plaintiffs came, as the ditch was constructed by the defendants, onto the land of the plaintiffs through this ditch and did not run onto or into the house, but ran across the lot of the plaintiffs, not in any stream which had banks to it and a channel, but over the land, seeping into the soil to some extent, perhaps, and running across it to some extent—if that was the case before the injury to the house, and then the plaintiffs themselves in the management of their property graded it, *no matter for what purpose, if for any legitimate purpose*, and so graded it that it caused the water instead of running over the lot to run

against the house and into the house, and thereby an injury resulted to the house of the plaintiffs, *which is the only injury they complain of* — if that was caused by a disturbance of the surface of their own land by the plaintiffs, and the water which flowed over their lot or seeped into the earth before ran into their house in volume such as to become injurious, and did injure the property, it would be their own loss in that event. The plaintiffs would not be entitled to recover, and the verdict in that event should be for the defendants.

“If you find that the water, as I have already said to you, was caused by the act of the defendants to run through this ditch and into the house without any effort on the part of the plaintiffs which caused it to run into the house, in that event you should find for the plaintiffs; and your verdict should be such damages for injury to the house as you find from the evidence was caused by the water that was so turned from the railroad ditch by the defendants onto the lot and onto and into the house of the plaintiffs.”

It is to this qualifying and restrictive part of the general charge of the court, which we have recited, that the plaintiffs excepted. The theory of the instruction appears to be that the defendants had the right to discharge the accumulated water from the artificial ditch through the cutaway into the depression or gully on the plaintiffs' lot, and that the latter filled up the depression and levelled their lot at their own peril of having the lot flooded and their house submerged in water, without the right to question the power of the defendants to discharge the water from the ditch by the outlet or cutaway onto the lot of the plaintiffs. In this we think there was manifest error.

As will be observed from the terms of the instruction given, the learned court below would seem to have been under the impression that the injury to the plaintiffs' house on the lot over which the water was discharged from the ditch was the only injury of which the plaintiffs complained, or for which they could recover. The court seems to have overlooked the extent of the injury complained of in the

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declaration, and also the proof that was produced in support of the allegation. The declaration alleges that by reason of the discharge of the water from the said ditch "the plaintiffs' lot was overflowed, drowned, and submerged to a great depth, to wit, to the depth of six feet, and large bodies and quantities of water were collected and accumulated and caused to stand and remain thereon, and to sink into the soil thereof, and the said lot was thereby rendered wet, swampy, unhealthful, and unfit for the uses to which it had been in its natural condition adapted, and the house erected on said lot as aforesaid, and the rooms, walls, floors, timbers and furniture therein were made wet, damp, rotten," etc. The proof as briefly stated in the bill of exception, as to the condition of the lot, is, "that in 1897, and after the construction or enlargement of the ditch, and the enlargement of the outlet thereof, a great volume of water was discharged from the ditch through the outlet upon said lot after every rain, so that the ground was made much wetter and muddier than it had theretofore been, and the lower story of the house was often overflowed to the depth of 16 or 18 inches, and other damage was done to the house and lot." There was not wanting, therefore, either allegation or proof as to injury suffered by the lot apart from the house.

Whatever difference there may be supposed to exist as between the rule of the civil law and that of the common law in regard to the manner of treating surface water naturally flowing from an upper to a lower tenement, such difference can be of no importance in a case like the present. This, as appears from the facts we have stated, is not the case of the natural flow of surface water, arising from natural causes only and flowing without artificial means; but is the case of the gathering and concentration of surface water from an extensive area, into an artificial channel or drain, and discharging it upon the premises of a lower proprietor to his injury. This, according to all principle, is regarded as a wrong for which the law affords a remedy. The principle is settled, both by the English and American decisions, that where the higher owner collects the surface water in one

body, or sends it down upon the lands of a lower owner in a different manner from that in which it is accustomed to flow, or in a concentrated form, or in unnatural quantities, he is liable for all the damages sustained therefrom by such lower proprietor. The servitude is to have the waters pass over the land in their natural flow, and a discharge of them in any other manner is a violation of the rights of the lower owner. Indeed, it is laid down as text law, "that no one has a right by an artificial structure of any kind upon his own land to cause the water which collects therein to be discharged upon his neighbor's land." This question has been very fully and intelligently treated by Mr. Gould, in his recent work on Waters, at sections 271-2-3, and 292-3, where the authorities are extensively collated. It is by that author said that "An owner of land has no right to rid his land of surface water, or superficially percolating water, by collecting it in an artificial channel and discharging it through or upon the land of an adjoining proprietor." And again, "A railroad corporation has no right, by the erection of embankments, the construction of culverts, or the digging of ditches, to collect and discharge unusual quantities of surface water upon adjoining lands." This principle is so reasonable in itself that it hardly requires authority for its support, and we shall only refer to a few cases that would appear to have special application to the facts of this case.

In a recent case in the Court of Appeal of England, that of *Whalley v. Lancashire & Yorkshire RR. Co.*, 13 Q. B. Div. 131, the question has been very fully considered and the principle applied. There, by reason of a very severe rainfall, a quantity of water was accumulated against one of the sides of the defendants' railway embankment to such an extent as to endanger the embankment, and, in order to protect their embankment, the defendants cut trenches in it by which the water flowed through and went ultimately onto the land of the plaintiff, which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater extent than it would have done had

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the trenches not been cut. In an action for damages for such injury the jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently. But the court was unanimous in holding that, though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff; that they had no right to sacrifice the property of their neighbor in order to protect their own, and, therefore, as said by the court, upon the plainest principle of right and justice, the defendants were liable.

The same principle was in very unqualified terms asserted and applied by the Court of Common Pleas, in the case of *Baird v. Williamson*, 33 Law J. 101. That was the case of water pumped from a mine and allowed to escape over land of a lower proprietor. In that case the defense was that the water had been discharged from the mine with great care to avoid damage, but the court held that to be no excuse for the injury done the plaintiff.

In the American courts the question has been frequently under consideration, where railroad companies have, by ditches along their tracks, gathered the surface water, and by drains turned it off on the lands of adjoining lower proprietors, and the courts have uniformly held, as the English courts have held, that the railroad companies were liable for the damage thus produced. In all such cases it has been held that there was no right, either by the civil or common law, to concentrate or accumulate the surface water in ditches along the tracks or bed of the road and by cutaways or outlets turn it upon the lower adjoining or adjacent lands to the injury of the proprietors thereof. *Curtis v. Eastern RR. Co.*, 98 Mass. 428; *Springfield, etc., RR. Co. v. Henry*, 44 Ark. 360; *Toledo, etc., RR. Co. v. Morrison*, 71 Ill. 616; *Hogenson v. St. Paul, etc., RR. Co.*, 31 Minn. 224; *Missouri Pac. RR. Co. v. Keys*, 55 Kans. 205; *Mayor v. Sikes*, 94 Ga. 30; *Kansas City RR. Co. v. Smith*, 72 Miss. 677; *Kansas City RR. Co. v. Lackey*, 72 Miss. 881; *Waffle v.*

New York Cent. RR. Co., 58 Barb. 413, affirmed in 53 N. Y. 11.

In several of the cases it has been said that surface water is a common enemy that the owner may repel from his premises without incurring liability to his lower adjoining proprietors, but an exception is always recognized to the general rule, and that exception is, that it is not allowable to an upper owner to collect the surface water by means of ditches or drains and discharge it on the premises of a lower owner. If he does so he is liable for all the consequences.

It would seem from the part of the instruction of the court given, and to which exception was taken, that the case was submitted to the jury on the single question, whether there was damage done to the house of the plaintiffs, and whether that damage was the result of the grading of the lot by the plaintiffs, thereby disturbing what was supposed to be a lawful right of drainage by the defendants of the artificial ditch along the railroad track. But there is no question of prescription raised and relied upon by the defendants as giving them the right of drainage through the lot of the plaintiffs; and it is conceded on all sides, both by court and counsel, that the depression or gully, as it is called, in the lot of the plaintiffs was not a natural watercourse. The defendants had no right to utilize the depression or gully in the lot of the plaintiffs for the purpose of receiving the water from the ditch along the railroad tracks; and the plaintiffs had a perfect right, in the absence of a prescriptive right of drainage by the defendants, to fill up and level their lot to suit their own purposes. As to what will constitute a natural watercourse into which a party may be entitled to discharge the gathered or accumulated waters from an artificial drain, see the case of *Gibbs v. Williams*, 25 Kans. 210. The owners of the lot with such a depression in it were under no legal obligation to receive the flow of water that was turned into it, and they were at liberty to fill up the depression whenever it suited their purpose. *Ib.* See also the case of *Hogenson v. St. Paul, etc., RR. Co.*, 31 Minn. 224.

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In the case of *Beard v. Murphy*, 37 Vt. 99, a question was presented very similar to that presented in the present case. In that case it was held that a lower owner was justified in making embankments or other obstruction to the flow of surface water over his land, if the upper owner persisted in discharging other water from his land than the natural surface water that arose thereon and which ran upon the lower owner's land, even though the upper owner suffered great damage in consequence of such embankment. The court held that the servitude only existed as to water arising from natural causes on such upper land, and if the owner of such higher ground discharged other waters over the lower land, it was a nuisance, and, therefore, actionable and abatable by the person injured.

In the present case, the plaintiffs, in the latter part of the year 1898, did construct a dam across the mouth of the outlet from the ditch, and thereby stopped the discharge of the water on their lot, and it does not appear that the defendants made any objection to such assertion and exercise of right by the plaintiffs. On the contrary, finding it necessary for the protection of their tracks, they extended the ditch about 200 yards within their right of way, so as to make it discharge the water therefrom into a stream that ran under the tracks.

Without deeming it necessary to decide whether the first prayer offered by the plaintiffs, requiring the verdict to be rendered for the plaintiffs, was not too general, and, therefore, properly rejected, we shall, for the reasons stated, reverse the judgment below for errors in the general charge to the jury; and it is so ordered.

Judgment reversed and cause remanded.

STAPLETON v. KINNEY.

PATENTS; INTERFERENCE; REASONABLE DILIGENCE.

Where S., a patent attorney and skilled mechanic, conceived an invention of an improved retaining device for rubber tires in April, 1897, and could have applied it to practical use at any time by means then well known in the art, with which he was thoroughly acquainted, although such means were crude and imperfect, but instead of doing so he devoted his time for more than two years to devising a simple and economical machine for applying the retaining device, so that he did not reduce to practice until November, 1899, and in the meantime K. conceived in October, 1898, and reduced to practice in April, 1899, it was *held*, that S. did not exercise due diligence in regard to the retaining device and K. was entitled to award of priority.

No. 170. Patent Appeals. Submitted May 14, 1901. Decided June 7, 1901.

HEARING on an appeal from a decision of the Commissioner of Patents in an interference case. *Affirmed*.

The facts are sufficiently stated in the opinion.

Mr. Charles W. Stapleton in proper person.

Messrs. Peirce & Fisher for the appellee.

Mr. Justice SHEPARD delivered the opinion of the Court:

This is an appeal from the decision of the Commissioner of Patents in an interference proceeding involving priority of invention of an improved rubber tire for the wheels of vehicles. This issue is in the following words:

“A tire for vehicles comprising an annular channel, an annular elastic body compressed in the direction of its length and molded with a continuous closed chamber throughout its length, and a retaining-ring embedded within and filling said

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chamber and having its ends joined together, said ring consisting of a central web having solid thickened edges, said thickened edges extending both above and below the plane of said web and thus forming channels on both sides of the ring to receive the compressed rubber of the body, and hold the ring against lateral displacement."

Frank W. Kinney filed his application for patent January 16, 1899, and was followed by Charles W. Stapleton on the 23d day of the following June.

We agree with the tribunals of the Patent Office that the following facts are fairly established by the evidence:

Stapleton conceived the invention of the issue and disclosed it to others about April 1, 1897, and reduced it to actual practice about November 1, 1899. Kinney conceived and disclosed it about October 15, 1898, made and put in use upon a vehicle, a full set of tires embodying the improvement about April 1, 1899.

Stapleton, though first to conceive, did not enter the Office, even, until more than two months after Kinney had begun the manufacture and sale of the improved tires; hence the burden of showing due diligence was cast upon him. In determining this issue it is of importance to know what was the state of the art in which the invention is an improvement, and some of its conditions will be briefly stated.

Rubber tires had been in use upon vehicles for some years, and many different forms of construction had been experimented with. Two only of the special devices used for retaining the rubber tire in the flange on the wheel-rim need be described, because they were greatly superior to all others and, besides, have near relation to the improvement of the issue. One of these consisted of two round steel wires inserted in the tires parallel with each other and a short distance apart; the sizes of wire and separating distances varying with the width of the tire. The other was a flat steel band with straight edges likewise inserted in an aperture in the tire.

The rubber sections were cut in the desired lengths and the retaining wires or bands inserted. The ends of the lat-

ter were then fastened by riveting, brazing, or electric welding, and the inclosing rubber ends were brought together and cemented. It was soon discovered that the retaining wires of the first construction had a tendency, especially under hard usage, to cut down through the inclosing rubber tire, thereby gradually destroying it, as well as reducing the constriction. They seem, however, to have worked better than the flat band that had been devised to remedy their defects in this respect, because the lateral cutting of its straight edges was more rapidly destructive of the tire.

The improvement of the issue is a practical combination of the two earlier devices. The two round wires are joined together by a flat band varying in width with that of the tire. It is claimed for the improved retaining device, that joining the wires in this manner prevents the downward wear, whilst their operation in rounding the edges of the band prevents the dangerous lateral cutting. The first method of applying the rubber tire was to fasten the ends as above described. It was then stretched and pushed over the edge of the flange until it dropped into its proper place therein. This construction and application were attended with two difficulties that operated against the commercial use of the tire. First, there was the danger of severing the connections of the retaining wires or band under the strain of the necessary stretching; second, the tire was often too loose when forced to its place in the flange.

Efforts were early made by manufacturers to devise a better means for applying the tires to wheels. Stapleton, who is a skilled patent attorney, had been a practical mechanic in early life. He testified that throughout 1897, and until October 15, 1898, he had been "president and manager of the American Rubber Tire Co., and actively engaged in looking after its business, also practicing law. During this time I looked after not only the business features of the company, but the mechanical as well; in fact, did substantially all of the mechanical part of the work so far as designing and devising tools, machinery and tires are concerned."

Again he said: "I was never satisfied with the method

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of first making the tire into a hoop and stretching it over the flange, and since about January, 1897, I began to evolve a plan to apply them by drawing them up within the steel flange. That had never been done, so far as I know, until the fall of 1897, when the Rubber Tire Wheel Co., Morgan and Wright, and myself, all working to reach that end, accomplished it about the same time by different tools or the use of different tools. This system, however, was not perfected so that it could be said to be thoroughly practicable, until late in 1898."

It appears from testimony on behalf of Kinney that the Morgan and Wright method of bringing the retaining wires and rubber tires together in the channels of the wheel-rims, was practiced in the shops of the Calumet Rubber Tire Co. in January, 1897. The ends of the wires were clamped and the rubber was compressed and forced back a short distance to a point on each side where it was firmly held by a vise. The tire was then brought around the wheel in the channel and the wires were drawn until the desired tension was had. The ends were fastened by threaded sleeves. The clamps were then removed and the rubber was driven back to meet over the joint, by striking against the wall or with a heavy mallet. In February, 1897, an improvement was made in the clamping system and the wires were joined by brazing instead of screwing together as before. Many tires were thus applied and sold to customers. Kinney subsequently worked upon and had made a device for clamping the tires and reducing the compression of the rubber after fastening the retaining wires.

It may be assumed that the retaining band of the issue was harder to stretch over the flange of the rim in the old way than the other devices had been, and that it was of very great importance to devise an effective way to fasten it in the channel. Kinney discovered the improvement and filed his application for a patent before securing a satisfactory device for the purpose. He subsequently manufactured tires with the improved bands, and applied them to the wheels as he had applied the others in January and February, 1897.

It was shown that some other factories used the Morgan and Wright process, or others of their own adaptation, in applying rubber tires in 1897, 1898, and early in 1899.

We come now to consider the special grounds offered by Stapleton in excuse of his apparent delay in reducing to practice his conception of the improvement in, or before, April, 1897.

It must be remembered that he was fully informed of the state of the art, and alive to the defects of all the retaining devices then in use. He appreciated the increasing demand for rubber tires of ready application and was pecuniarily interested in supplying it. Not only an educated and skilled mechanic, he was also a competent and experienced patent attorney; and hence was aware of the importance of diligence in reducing conception to practice either actual or constructive. He had ample time, money and agencies for experimentation and there was no reasonable obstacle in the way of procuring the manufacture of the new band to order.

His sole excuse, then, is found in his own sworn statement as a witness as follows:

"I do not mean to be understood that any fairly skilful mechanic familiar with rubber tires could not, if given time and opportunity, have devised a machine for making the joint in the channel and drawing up this rubber; in fact I could have done so myself, I believe, at almost any stage of the proceeding, but the problem was to get some machine or system of doing this economically, so that the general public, or the small dealers could afford the appliances for doing the work themselves. As the system has been conducted the application has been confined to a few large places, and wheels and tires had to be transported long distances, while there was a constantly-increasing demand, not only by the small dealers but their patrons for the application of these tires at their own homes or places of business, and the great expense of the Grant and Goodyear system was a great drawback. I was trying to overcome this by devising tools so inexpensive and a system so simple that it did not require an expert to use them, and that the ordinary and small carriage-dealers could afford to have them."

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This was followed by the admission that he had heard of the Morgan and Wright method of joining the tires in the channels, in the fall of 1897, but had not seen one of their devices before the fall of 1898. The contention of Stapleton, upon the foregoing and other explanatory evidence, is fairly presented in the following proposition on his brief:

"It is not claimed that Stapleton during the two years was constantly experimenting with this 'wire band.' On the contrary, it is frankly admitted that the invention itself — that is, the 'wire band' — was completely invented when first thought of, but it is insisted that during this time Stapleton was, as diligently as the law requires, engaged in perfecting practical devices which were accessory and absolutely essential to the usefulness of the principal device, which, without some such accessory device, was of no commercial value whatever — was as steam without an engine, the sewing-machine needle without the mechanism to run it, a telegraph-line without recording devices."

We are unable to concur in this proposition. It is hardly necessary to say that the invention was not complete with even the clearest conception of the practical advantages and usefulness of the new form of retaining band, without the construction of at least one complete tire capable of test by use. Whether, considering the state of the art, that would be sufficient without the actual test need not be considered. The improved tire was an invention separate and distinct from the means sought for its simple and ready application to the wheel and, in that sense, was complete without the successful attainment of the latter end. It is no doubt true, and may be conceded, that Stapleton worked with reasonable diligence to obtain a simple and economical device for applying the new tire, and that he has succeeded in producing one of great utility as well as of patentable novelty. But the utility and commercial value of the improved tire did not necessarily depend upon that attainment. In that respect there was no practical difference between it and the earlier tires for the displacement of which it had been devised. There were other methods and devices in operation,

as we have seen, which, though crude and cumbersome, had nevertheless proved sufficient to extend the use of, and give commercial value to the former tires; and these had been successfully used by Kinney with the improved tire. Now it is true that one may make an original discovery, or conceive a distinct and valuable improvement in an art, dependent for its practical demonstration or operative use upon the invention of further or additional mechanical appliances. Notwithstanding the two devices, in such case, could be regarded as patentably distinct and separate in the Patent Office, it might well be that pause in the perfection of the one would be excused by due diligence in the completion of the other as its accessory. *Chapman v. Candee & Taylor*, S. C.; C. D., 1872, 190; 2 O. G. 245. That was an interference proceeding involving the invention of a device for forging wrench-heads that had formerly been forged by hand. It comprised certain dies and auxiliary machinery. Chapman was the first to conceive. His rival made the first application and received a patent, but never made or operated the invention. Chapman's first results were unsatisfactory and he pursued the discovery of operative means with diligence. Finally, by continuous labor and experiment and the expenditure of more than \$5,000, he completed a machine that operated with complete success. In holding Chapman entitled to the benefit of his prior conception, Mr. Commissioner Leggett said:

"Though the invention, in a narrow sense, was complete upon the completion of the dies, yet the dies were totally valueless until machinery could be constructed of the proper strength and form to use them. Whether such machinery to work dies of large size was practicable was uncertain. Upon the determination of this point depended the question as to whether the dies were worth patenting; hence the time spent in constructing the machinery was used in such experimental tests as were wise and proper before applying for a patent."

It has also been held that under certain conditions some indulgence might be extended to an inventor who delayed a particular feature of a complicated machine whilst diligently

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engaged in developing another part of the same machine calculated to materially increase its usefulness and value. *McCormick v. Cleal*, 12 App. D. C. 335, 341; *Christensen v. Ellis*, 17 App. D. C. 498; 94 O. G. 2561.

We think it sufficiently clear, without further discussion, from the history of the art and the facts of the case at bar, as heretofore stated, that the conditions of diligence upon which it turns are essentially different from those upon which the foregoing decisions were expressly rested.

Moreover, as has been repeatedly stated, it is impossible to measure diligence by any fixed standard. Each case must be determined by its own particular circumstances.

Considering the special circumstances of the case at bar, we are of the opinion that Stapleton's efforts to invent machinery for the simpler, cheaper and more effective application of the improved tire, cannot be accepted as due diligence in completing its invention. Grant that some measure of indulgence might justly be extended him, under ordinary circumstances, in respect of the matter of actual construction and test of commercial value, yet, the well-known conditions of the art and the wide-extended trade in rubber tires, subject to similar difficulty and expense in application, made it incumbent upon him to, at least, seek constructive reduction by filing an application for a patent. Why he did not do this much remains unexplained. His conduct in both respects is in marked contrast with that of Kinney who conceived the invention in October, 1898, filed his application for patent in January, 1899, and commenced manufacture for the trade in the following April.

For the reasons given, the decision of the Commissioner of Patents will be affirmed, and the proceedings in this court will be certified to him as required by law. It is so ordered.

FONTANO v. ROBBINS.

BUILDING CONTRACTS; ARBITRATION; GUARANTY.

1. Where one article of a building contract provides, that in case of dissent by either party from the award of the architects as to allowances for alterations, submission shall be had to arbitrators, and another article provides that the owner shall provide all labor and materials not included in the contract in such manner as not to delay the material progress of the work and, in event of failure so to do, thereby causing loss to the contractor, that he will reimburse the contractor for such loss, and that the amount of such loss shall be fixed and determined by the architects or by arbitration, as provided for in the first-named article, an award by the architects or by arbitrators is not a condition precedent to the maintenance by the contractor of an action against the owner for a breach of the provisions of the second article.
2. One who, with the approval of church authorities engaged in the construction of a church building, undertakes to provide the interior construction of a chapel to be connected with the church, and who, in furtherance of such undertaking, enters into a contract with another for such work, which contract provides that "the owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in event of the failure so to do, thereby causing loss to the contractor, agrees that he will reimburse the contractor for such loss;" thereby takes the place of the real owner for the purposes of the contract, and becomes an absolute guarantor of the necessary construction preliminary to the commencement of the other's work.

No. 1049. Submitted May 14, 1901. Decided June 7, 1901.

HEARING on an appeal by the plaintiff from a judgment of the Supreme Court of the District of Columbia, entered upon a verdict directed by the court in an action of covenant. *Reversed.*

The COURT in its opinion stated the case as follows:

This is an action upon a contract under seal to recover the sum of \$3,888.10 on account of time lost and extra ex-

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penses incurred through delay caused the plaintiff in the performance of his undertaking. The contract was entered into on August 19, 1895, by the plaintiff, Primo Fontano, of Carrara, Italy, party of the first part, with the defendant, Mary Helen Carroll, now Robbins, of Howard County, Maryland, party of the second part. In consideration of the sum of \$28,500, promised to be paid by the defendant, the plaintiff undertook, under the direction and to the satisfaction of certain architects, to provide all the materials and perform all the work shown in the drawings and specifications of said architects "for the interior marble finish of the Chapel of St. Anthony of Padua, in the Church of St. Matthew, Washington, D. C., including the ceiling of decorative plaster-work and the three windows of transparent alabaster all set up in place complete." The work was to be completed on or before October 1, 1896. Provision was made for the extension of the time set for completion upon certain contingencies; among them "the neglect, delay or default of the owner, or the architects, or of any other contractor," and so forth. The case turns upon the construction and application of the following articles of the contract:

"Article 3. No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architects, and when so made, the value of the work added or omitted shall be computed by the architects, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three (3) disinterested arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expenses of such reference.

* * * * *

"Article 8. The owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the

event of failure so to do, thereby causing loss to the contractor, agrees that he will reimburse the contractor for such loss; and the contractor agrees that if he shall delay the material progress of the work so as to cause damage for which the owner shall become liable (as above stated) then he shall make good to the owner any such damage. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the architects or by arbitration, as provided in art. 3 of this contract."

Defendant's single plea denied causing delay to the plaintiff, and alleged full performance on her part, including the full payment of the price stipulated.

Cariolano Fontano, a brother of the plaintiff, proved the execution of the contract and admitted the payment of the sum stipulated therein. As recited in the bill of exceptions:

The witness further testified that upon his return to Italy in 1895, and after the signing of the contract, his brother immediately began the work on the stone preparatory to having the same ready to be set up in the chapel and completed within the time provided in the contract; that about March, 1896, a considerable portion of the cut stone was shipped to America, and that in June, 1896, practically all of the marble was cut and ready to be shipped to America, but, owing to the fact the plaintiff learned at that time that the walls of the chapel had not been completed, and that the roof had not been begun, the plaintiff did not forward the balance of the stone to America, as he was about to do; that as soon as plaintiff thus learned that said walls and roof were not completed he wrote at once to the architects requesting them to complete the same immediately, as he was ready to put up the marble, but no answer was received from the architects; that the plaintiff thereafter, between June and October, 1896, and afterwards wrote repeatedly to the architects urging them to complete the walls and the roof in order that he might complete the work as provided in the contract, but the plaintiff did not hear from the architects; that plaintiff was ready to begin the setting of the marble in June, 1896, and could have completed his part of the contract before October 1,

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1896, had the walls of the chapel been put up and the roof put on; that marble can be set quicker in summer than in winter; that if he could have begun the setting of the marble in June, 1897, he could have completed the same within from two to three months; that the specifications which were made a part of the contract provided that the work of setting the marble should not begin until the walls were up and the roof on.

The witness was here handed the specifications and identified the same as the specifications furnished the plaintiff as a part of the contract. The specifications, which were introduced in evidence with the consent of the defendant and read to the jury, provide, among other things, as follows:

"The outside walls will be built, rough concrete floor finished and the chapel will be roofed in when the contractor commences to set marble-work. All brickwork supported on the columns of chapel will be done by owner's brickmasons at such times and in such manner as the contractor may require; the contractor must, however, keep these brickmasons under his supervision and so arrange that they shall do no damage to his finished work or materials on the ground."

"Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by the architects, and their decision being just and impartial, shall be final and conclusive."

"The contractor is to furnish all necessary materials, labor and transportations, and is to provide all tools, derricks, scaffolding, and all other necessary means, utensils, and appliances for properly prosecuting his work."

"Particular care must be taken by the contractor as the building progresses of all finished work, which work must at all times be covered up and thoroughly protected from injury or defacement."

The witness further testified that this incomplete condition of the walls and roof continued, and that by direction of the plaintiff he came to America on June 11, 1897, and went immediately to see the architects, Heins and La Farge, and told them that his brother has been delayed for nearly

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a year in the erecting of the marble-work, owing to the walls not being up and the roof not being on, as provided in the contract and specifications, and urged the architects to put the walls up and the roof on immediately, so that he could begin his setting of the marble, and stated that a considerable part of the marble had been in Washington for over a year, and that the whole of it was now there ready to be put up; but the architects told him that there was no reason for his not commencing and performing his work as provided in the contract. The witness then told the architects that it was impracticable and impossible for him to do the work in the then condition of the walls and roof of the chapel without subjecting the marble-work to injury from breakage and stains; that the architects thereupon told the plaintiff to go down and try to set the marble to please Father Lee; that Father Lee had marble-work to give him if he would please in the performance of this contract. The witness thereupon informed the architects that he would come to Washington, and that he would see what he could do; that he came to Washington and examined the chapel and found that the level of the floor was two inches too low for the setting of his marble; that he thereupon notified the architects and shortly thereafter the witness was himself compelled to raise the steps and platform of the altar; that he found the walls, which were to be thirty-eight feet high, were only twenty-two feet up, and there was no roof on the chapel, as provided in the specifications. Witness was here shown a letter which he identified. The same was introduced and read to the jury. The letter is as follows:

" 725 19TH ST. N. W.

" WASHINGTON, D. C., 13th July, 1897.

" Messrs. Heins & La Farge, architects, Temple court, 7 Beekman street, New York.

" GENTLEMEN: Referring to my contract with Miss Mary Helen Carroll, under date of August 19th, 1895, relating to the interior marble finish of the chapel of St. Anthony of Padua in the church of St. Matthew, Washington, D. C.,

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I take the liberty to call your attention, as Miss Carroll's architects, to the fact that it is impracticable for me to put up any of the work in said chapel in its present incomplete condition, which I am required by said contract to do, and it is utterly impossible for me to complete said contract until the walls of said chapel shall have been completed and the chapel placed under roof.

"I take the liberty to notify you that I have had all my material here for more than a month, ready to put up according to contract, and that I have been in Washington one month at heavy expense, waiting to perform my part of said contract, but have been delayed on account of the incomplete condition of the chapel.

"Very respectfully,

"PRIMO FONTANO,

"P. C. FONTANO."

Witness further testified that he had received a reply to his letter of July 13th, and the same was identified by him, introduced in evidence, and read to the jury. The letter is as follows:

"Heins & La Farge, architects, Temple court, 7 Beekman St., New York.

"JULY 16, 1897.

"MR. C. FONTANO, 1725 19th St. N. W., Washington, D. C.

"DEAR SIR: We have your note of July 13th, in which you notify us that you can not go on with the marble-work of the chapel until the roof is on. We venture to differ with you in regard to your interpretation of the clause in the contract to which you refer, for two reasons:

"1st. That it is entirely practicable to set your marble-work, so much of it, at least, as is necessary to support the masonry above which rests upon the marble.

"2nd. When I visited Washington a week or so ago, at your request, we had agreed that you were to go ahead on this basis.

" We have, therefore, to request of you that you will carry out this understanding and commence to set the marble-work upon the outside walls, so far as may be necessary to support the brickwork above.

" Our interpretation of the clause in the contract which relates to setting the marble after the roof is on refers to the arcade between the chapel and the church and to the slabs lining the walls.

" We wish to call your attention to the fact that the general conditions printed on the specifications provide that the architects are to decide disputes arising respecting the true construction or meaning of the drawings or specifications. We are distinctly of the opinion that it will make a better piece of work to have the columns along the wall and the arches above them set in place before the wall is carried up any higher, as the inside lining wall can then be properly bonded to the outside wall, and the columns themselves can be anchored firmly in place. If you do not proceed as above, you will have to hold yourself answerable for any damages which may occur through your refusal so to do.

" Yours very truly,

" HEINS & LA FARGE,

" per G. L. HEINS."

Witness further testified that he attempted to do the work and set in place several pieces of marble and some of the skirting, but that after working a day or two there was a heavy rainstorm which prevented him from further carrying on his work, for the reason that the water poured into the space between the marble and the brick walls, thereby damaging the cement and staining the marble; that he thereupon immediately notified the architects that it was impracticable for him to do the work until the walls were up and the roof on.

Witness further testified that he went to see Mr. George E. Hamilton, the attorney for the defendant, but found him out of the city, and that he was at the same time informed that the defendant was in Europe; that upon Mr. Hamilton's

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return from Europe he called upon him at his office in this city and told him the condition of the walls and the roof, and that he had been here some time at heavy expense and urged him, as the attorney of the defendant, to have the walls erected and the roof put on, in order that he might go on with his work; that Mr. Hamilton told him that he did not know where the defendant was, but that he would write to her father and ascertain, and further told the witness that the plaintiff should suffer no loss on account of the delay; that he was compelled to wait around doing nothing until the latter part of August, 1897, when the witness was informed by Mr. Hamilton that the defendant was in New York; that on the 31st of August he saw the defendant at Coney Island, and that he told her that he was unable to set the marble, owing to the walls of the chapel not being up and the roof not being on, and that he had been here for some time at heavy expense, and urged her to have the walls put up and the roof put on so that he might go on with his work; that the defendant said that she could do nothing, that she had nothing to do with the walls or the roof, and disclaimed all responsibility for anything connected with the building of the walls or the roof of the chapel, and that witness would have to wait until the chapel was ready to receive the marble-work, and advised the witness to return to Italy until the chapel was ready, and that she further told witness that the plaintiff knew that she had nothing to do with the walls or the roof; that he told the defendant that he could not go back to Italy, as all his brother's capital was sunk in this job; that some time in September the work of completing the walls was begun, and that some time about the middle of October the work of putting on the roof was begun; that on the 18th day of October, the earliest day practicable, the witness began the setting of the marble in the chapel, and at that time a part of the roof was on — that part immediately above the point where he was setting his marble. Witness further testified that he was further delayed by the architects about a month in furnishing him with a diagram of the ceiling and the size of rosettes

for the doing of the decorative plaster-work on the ceiling of the roof; that on October 6, 1897, the witness wrote to the architects and requested the diagram of the ceiling, but did not receive the diagram as requested, and on December 9, 1897, again wrote to the architects for the diagram; the said letter, which was introduced in evidence and read to the jury, is as follows:

“ 1201 20TH ST. N. W.,

“ WASHINGTON, D. C., 9th Dec., 1897.

“ Messrs. Heins & La Farge, architects, Temple court, 7 Beekman St., New York.

“ GENTLEMEN: The work on the contract of Prof. Primo Fontano in the chapel of St. Anthony of Padua, at St. Matthew's church, Washington, D. C., has progressed so far that it becomes necessary to request that you forward at once to me the plans for the ceiling. Any delay in furnishing these plans will cause me considerable unnecessary expense, which I wish to avoid. You will recall that the price of this work was agreed to be \$250.00.

“ You will oblige me greatly by a prompt compliance with my request.

“ Respectfully yours,

“ PRIMO FONTANO,

“ P. C. FONTANO.”

That he again wrote to the architects on December 31st, calling their attention to the failure to provide the framework, including the lath to receive the decorative plaster-work. Said letter, which was introduced in evidence and read to the jury, is as follows:

“ 1201 20TH ST. N. W.,

“ WASHINGTON, D. C., 31st Dec., 1897.

“ Messrs. Heins & La Farge, architects, Temple court, 7 Beekman St., New York city, N. Y.

“ GENTLEMEN: I have to inform you that I am now ready to put up in the chapel in the church of St. Matthew's the ceiling of decorative plaster-work called for in my contract with Miss Mary Helen Carroll under date of August 19th,

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1895, and I have further to inform you that nothing has been done towards putting in place the frame-work, including the lath, to receive said decorative plaster-work, which you on the 16th instant promised me you would have done right away.

"You are hereby respectfully notified to have said frame-work and lathing put in at once and thereby save the expense to Miss Carroll that may result from my having to wait to have said framework and lathing put in.

"Respectfully,

PRIMO FONTANO,
"p. C. FONTANO."

That on January 19, 1898, witness received the diagram for the decorative ceiling, and was also informed by the architects that the plaintiff would have to provide the frame-work and laths for receiving the decorative plaster; that, although witness did not consider that plaintiff had to provide the framework and laths to receive the plaster, yet witness did purchase and have put up the frame for this purpose in order to prevent further delays.

That the contract work was completed March 15, 1898.

He further testified to bringing a skilled workman from Italy to help him set the marble, and to the charges for his and witness's time and expenses while waiting; to extra custom-house storage charges upon the marble, and so forth, in support of the itemized statement of the plaintiff's demand. He further said that about the time of the institution of the suit he was told by defendant's attorney that she would not pay any damages or expenses sustained; but was not sure whether this was before or after the institution of the suit. He also testified, that it was impossible to set the marble in the chapel until the walls were up and the roof on; that the drippings of mortar and cement from the walls and ceilings would have stained and probably ruined his marble-work; that rain water on marble tends to discolor it, and that it is impossible to remove the same; that cement and lead are used in setting marble, and these likewise have a tendency to discolor it if rain water comes in contact; that

when he began setting marble in October, 1897, he found it necessary to take up and reset the pieces of marble he had set some months before, because rain had caused the cement to rot. On cross-examination, he testified that he knew Father Lee was building the chapel and church, and got from him a contract for putting two marble columns in the church; that he had never notified defendant personally about his claim, and that he had never consulted the architects or the defendant in regard to arbitrating his claim. He further said:

"That there was an inner and outside wall to said chapel, according to the plans; that the inner wall was to be built thirty-two feet high; that on top of the marble columns was to be brick masonry up to the roof; that the marble-work had to be carried up together for the reason that if the columns had been set in place it would have been impossible to set the marble slabs which lined the wall behind the columns, owing to the columns being required to be set very close to the walls; that he did not have room to work behind the columns."

Two witnesses, called for the plaintiff, testified that the walls of the chapel were not begun until some time during the latter part of September, 1897, and that plaintiff began setting the marble in October; that the roof was only partly on and was begun about the middle of October; that rain water tends to discolor marble and the stains cannot be removed. One of these witnesses had the contract for the brickwork of chapel and church, and the other was his employee.

On cross-examination, the contractor testified that his contract was with Father Lee, and the work was done under his directions and those of Heins & La Farge, his architects. Payments were made by Father Lee; that Miss Carroll was not known in the matter by the contractor, and gave no directions to him; that the work upon the brick walls would not interfere with or prevent the marble man from working, but it was not practicable to put in the marble-work before the roof was on.

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On the conclusion of the plaintiff's evidence, the defendant moved the court to direct a verdict for the defendant, because:

1. The plaintiff's proof did not make out a case.
2. The plaintiff had failed to prove a reference to arbitration before bringing suit, which is a condition precedent to the right of action.

The motion was granted generally, and from judgment on the verdict so returned the plaintiff has appealed.

Mr. Benjamin S. Minor, Mr. Joseph F. Collins and Mr. O. D. Barrett for the appellant.

Mr. G. E. Hamilton and Mr. M. J. Colbert for the appellee:

1. The plaintiff's whole case rests upon the assumption that the defendant undertook and contracted to have the main structure and the chapel walls ready to receive the plaintiff's work and that she, the defendant, must be held to have agreed to do all the balance of the work upon the church building. Certainly Mrs. Robbins never intended to assume such a large responsibility, and certainly Mr. Fontano never so understood the extent of her responsibility. In June, 1896, when he learned that the walls of the building had not sufficiently progressed to receive his work, he made no complaint to her, but wrote to the architects who were employed and paid by the building owner. When, in August, 1897, he was informed by the defendant that she had nothing to do with the erection of the walls, he acquiesced in her statement, and made no claim at that time that he would hold her responsible for any damage which he might sustain by reason of being delayed in the prosecution of work under his contract. Even if we ignore the circumstances, and the plain understanding and conduct of the parties, and even if we ignore the conduct of the plaintiff in receiving from the defendant the full amount which she agreed to pay him without making a single claim against her for

anything more, and if we confine ourselves to the bald language of the contract itself, it would seem clear that the plaintiff's contention must fail. "The owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work." What labor and materials? Can it be said that by this vague and meaningless language the defendant bound herself to the plaintiff to have this entire building erected at her own cost and expense? We submit that from the terms of the contract itself no such conclusion is justified. We submit that the parties never so understood the contract, and that the plaintiff was expressly advised by the defendant that she assumed no such responsibility, and the plaintiff, by his silence, and by his subsequent conduct, acquiesced in this statement, and that he is now estopped from setting up the present claim against the appellee when she is powerless to protect herself.

2. It is not pretended that the plaintiff demanded or was refused any reference to arbitrators, and, under the decisions of this court and of the Supreme Court of the United States, it is too late to dispute the validity of such provisions requiring the submission of disputes of this kind to arbitration. *Bailey v. The District of Columbia*, 9 App. D. C. 360; *Wood v. Hartshorn*, 100 Mass. 17; *Kihlberg v. United States*, 97 U. S. 398; *Hamilton v. Insurance Co.*, 136 U. S. 242. See also *Railroad Co. v. Price*, 138 U. S. 185; *Avery v. Scott*, 8 Exch. 500; *Scammon v. Denio*, 72 Cal. 393; *Weggner v. Greenstine*, 72 N. W. 170; *Insurance Co. v. Long*, 73 Ill. App. 663. *Hamilton v. Insurance Co.*, 137 U. S. 387, relied on by appellant, is not antagonistic to the contention now made.

3. The only remaining contention on the part of the appellant is that, by refusing to submit to arbitration, the appellee has waived her right to demand it as a condition precedent to the bringing of suit. This contention is based upon a misconception of the proof in the record. According to the plaintiff's own showing, he did not arrive in this country until June, 1897. In August, 1897, long before he had

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begun any work under his contract, he called on Mrs. Robbins and urged her to put up the walls, so that he could go on with his work, but Mrs. Robbins insisted that she had nothing to do with the walls or the roof, and that plaintiff knew that she had nothing to do with the walls or roof, and that was all that there was of the interview. In other words, the defendant insisted then, as she insists now, that, under a proper construction of her contract, she was not required to build the walls or roof of the chapel, but this was not a refusal on her part to ascertain and fix the amount of the plaintiff's loss by the mode pointed out in the contract after the plaintiff had completed his work. On the contrary, the plaintiff's brother and agent says that he does not know whether it was before or after the institution of this suit that he was informed by Mr. Hamilton, Mrs. Robbins' attorney, that she would not pay for any loss or damage sustained by the plaintiff in consequence of the delay caused in finishing the walls and roof of the chapel.

Mr. Justice SHEPARD delivered the opinion of the Court:

1. If the concluding clause of article 8 [of the contract] contained no reference to the action of any one but the arbitrators to be selected as provided in the last clause of article 3, for the ascertainment of the amount of loss and damage sustained by the plaintiff through the imposed delay, we could have no possible doubt of the plaintiff's right to maintain the action without precedent demand for arbitration. *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 385. The provision for arbitration in that case was substantially like the one in the contract upon which this action depends. Unlike that in the prior case of *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 242, it did not expressly declare that the award should be a condition precedent to the maintenance of an action upon the contract. It was, therefore, held, that the refusal of the plaintiff to submit the amount of his loss to arbitration, though promptly demanded, was no defense to his action. The distinction between the two

cases is thus stated by Mr. Justice Gray, who delivered the opinion in each:

"A provision, in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in *Hamilton v. Liverpool, etc., Ins. Co.*, above cited (136 U. S. 242), and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract." 137 U. S. 385.

The language of article 8, however, is that the amount of loss or damage shall be fixed and determined "by the architects or by arbitration as provided in article 3." Turning to article 3, quoted above, it will be observed that it relates to alterations that may be made by direction of the architects, and the ascertainment of allowances therefor by them. In case of dissent from their award, submission shall be had to arbitrators whose selection and powers are provided for.

It is a well-settled doctrine that, in contracts of this general character, the parties may specially provide for the final ascertainment of the quantity of work done, materials furnished and so forth, by reference to the engineer, architect or party having supervision of the performance of the contract; and that his estimates and reports when so made will bind all concerned unless actual fraud can be shown, or the commission of gross mistakes from which bad faith might be inferred. *Kihlberg v. United States*, 97 U. S. 398; *Chicago, etc., R.R. Co. v. Price*, 138 U. S. 185.

It is manifest that work and materials to be furnished in addition, or to be omitted, under the power given to the

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architects, to make alterations from time to time, were, for special reasons, to be estimated by them. But instead of making their estimate final and binding, either party was at liberty, if not satisfied, to demand arbitration, and final settlement thereby.

It is contended on behalf of the appellee, that the provision of article 8 referring to this mode of ascertainment by the architects is a distinct and separate condition and binds the plaintiff, in accordance with the doctrine stated, without regard to the effect of the additional stipulation for arbitration in event of dissatisfaction; in other words, the architects are the sole primary judges of the amount to be paid, and the reference to arbitration is only by way of appeal from their judgment.

Whilst this contention is plausible and may be sound in application to demands arising under the alterations stipulated for in article 3, we are unable to agree with it.

The particular reasons for referring demands made by either party, growing out of alterations which the architects were empowered to direct, to what is called, in article 3, their award, do not exist in the case of demands made under article 8. The former demands accrue as part and parcel of the work to be done in the performance of the contract, in case of probable contingencies that might call for the correction of the plans and specifications in some minor particulars. The latter are by way of damages sustained through nonperformance of the entire contract within time. The recital of article 8, providing for determination by the architects or by arbitration, would seem to call, with certainty, for no more than a reference to the architects as arbitrators merely. So considered, the reference is no more a condition precedent to the right of action than is that to the other mode of ascertainment through arbitration. Special stipulations submitting the demands of a contractor to the adjudication of supervising architects and engineers, though enforceable as we have seen, are in derogation of common right and the ordinary freedom of action, and must clearly appear to be within the intention of the contract.

Construction, in case of doubt, is in favor of one resisting enforcement.

The conclusion reached renders it unnecessary to consider whether, assuming the correctness of the contention, the defense thereunder would be waived by denial of all liability before the institution of suit, or loss by failure to plead it.

2. It appears from the evidence submitted that the defendant was not in fact the owner or builder of the church or the chapel attached thereto. The pastor of the church had contracted for its construction according to the plans and under the supervision of the architects, Heins & La Farge.

The defendant, with knowledge of the situation and the approval of the church authorities, undertook to provide the interior construction of the chapel, and employed the same architects to plan and supervise the work for the execution of which she contracted with the plaintiff. The plaintiff's action is founded on the provision of article 8, to this effect: "The owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the contractor, agrees that he will reimburse the contractor for such loss." This is reinforced by the following clause of the specifications referred to in the contract: "The outside walls will be built, rough concrete floor finished, and the chapel will be roofed in when the contractor commences to set the marble-work." That the defendant was not the real owner of the exterior building and as such obliged to construct the same and furnish all labor and materials not included in the plaintiff's special undertaking, is a fact that has no material bearing upon the controversy. She is the person referred to as "owner" in the contract with plaintiff and as to him she assumed that relation for the special purposes of that contract. She took the place of the real owner, and, at least, became an absolute guarantor of the necessary construction preliminary to the commencement of plaintiff's work. He was not bound to inquire into her relation to the general construction of the

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building, or her obligation to the contractors therefor. The argument that the plaintiff did not contemplate or understand this extent of responsibility on the part of the defendant, because he made no complaint to her in person of delay in the construction of the outer walls and roof, but complained, instead, to the architects who represented the real owner, is without substantial foundation. The architects of the building were also the architects, under the direction and to the satisfaction of whom, the plaintiff was to perform his part of the contract. They were to furnish the plans and specifications, interpret the same, supervise the work, direct changes, and certify to completion before final payment. They were the representatives of the defendant, and the correspondence between the plaintiff's agent and them shows on its face that his complaints were to, and his demands against them as such.

3. From the views expressed the conclusion necessarily follows that there was error in the direction to the jury to return a verdict for the defendant.

As the case must be remanded for new trial before a jury, we are not to be understood as expressing any opinion, whatever, in respect of the merits of the several items of plaintiff's claim of loss and damage.

All that we hold is, that under the interpretation given the contract between the parties, the evidence offered by the plaintiff was sufficient to require the submission of the issue to the jury.

The judgment will be reversed, with costs, and the cause remanded with direction to set aside the verdict, and award a new trial. It is so ordered.

Reversed.

SCOTT v. SCOTT.

PATENTS; INTERFERENCE.

In an interference proceeding, between an uncle, the senior party, and his nephew, the junior party, wherein the subject-matter in controversy was an improvement in the construction of thimbles for shoe-lasts, the testimony was reviewed and a decision of the Commissioner of Patents, awarding priority to the senior party as the first to conceive and reduce to practice was *affirmed*.

No. 175 Patent Appeals. Submitted May 15, 1901. Decided June 7, 1901.

HEARING on an appeal from a decision of the Commissioner of Patents in an interference case. *Affirmed*.

The facts are sufficiently stated in the opinion.

Messrs. Edison Bros. for the appellant.

Messrs. Howson & Howson and *Mr. R. T. Frazier* for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

This is an appeal from the decision of the acting Commissioner of Patents in an interference case, wherein the subject-matter of controversy is an improvement in the construction of thimbles for shoe-lasts. The issue is defined in the following three counts:

"1. A thimble or lining for the spindle-socket of a shoe-last having at intermediate points in its length, and at diametrically opposite points, integral spurs or prongs the stems of which are adapted to extend into the bore of the thimble when it is being inserted in a socket to hold the points of said spurs inside of the outer face or surface of the thimble.

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"2. A thimble or lining for the spindle-socket of a last comprising a section of light metal tubing having at its upper end a flange adapted to conform accurately to the top surface of a last about the spindle-socket, and having in its tubular body portion spurs adapted to engage with the last surrounding the spindle-socket.

"3. A thimble for the spindle-socket of a shoe-last, having integral spurs or prongs adapted to engage with the side walls of said socket at points above the lower end of the thimble."

In reference to the parties to this contest and the nature of the controversy, the examiner of interferences has this to say, which appears from the record:

"The parties to this interference have the same name, the only difference being in the spelling of the middle name of Emerson, the junior party spelling it with one 'm,' while the senior party spells it with two 'm's.' The record discloses that they are relatives, the senior party being uncle to the junior party. In order to avoid confusion in the consideration of the case, they will hereafter be referred to as uncle and nephew. From the testimony presented, it would seem that the question to be determined is one of originality rather than one of priority of invention."

The uncle, Scott senior, is the senior party to the interference, having been the first to come to the Patent Office, where he filed his application on May 10, 1898. In his preliminary statement he claims to have conceived the invention in question about December 25, 1893, at which time also he states that he exhibited a paper model and made disclosure of it to others. He alleges that he made a metal thimble containing the improvement about October 1, 1897; that, about the middle of October, 1898, a thimble embodying the invention was first placed in a last and the last used; that, during the month of December, 1898, a machine was made to construct such thimbles, and such thimbles were then actually made; and that there has been no use of the invention further than to test the availability of a few of the thimbles mentioned.

The nephew, Scott junior, filed his application in the Patent Office on February 11, 1899, which was about nine months after the uncle's application. He filed three statements, one of them before the uncle's statement was filed, and two of them after that time, and presumably after the contents of the uncle's preliminary statement had become known to him. In his preliminary statement first filed he alleged that he had conceived the inventions set forth in the first and third counts of the issue, explained them to others, and made drawings and a model of them, between the years 1886 and 1889; that about a month thereafter the same had been successfully tested; that he has since continued to use them, but that he had not manufactured any for use and sale; that he had conceived the invention of the second count of the issue about October 27, 1897; that about the same day he had made drawings of it, explained it to others, made a model, and successfully tested it; that about January 4, 1898, the improvement was successfully tested and operated; and that he had since then continued to use it, but had not manufactured it for use and sale.

The second statement, which he calls a supplemental statement, differs from the first only in an allegation that, on January 4, 1898, all three of the improvements in the several counts mentioned, were jointly and successfully operated and tested, while the first statement confined such test and operation of January 4, 1898, to the specific invention of the second count of the issue.

The third statement, which is designated as an amended preliminary statement, changes the date of the conception, explanation, and successful test of the invention of the second count from October 27, 1897, to September 27, 1897.

Testimony was taken; and upon this testimony the examiner of interferences decided in favor of the nephew, Scott junior. This decision was reversed by the board of examiners-in-chief, who awarded judgment of priority of invention to the uncle, Scott senior; and the decision of the board was affirmed by the Commissioner of Patents.

From the decision of the Commissioner the nephew, John Emerson Scott junior, has appealed to this court.

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A great part of the testimony in this case is irrelevant, immaterial, and utterly useless for the elucidation of the substantial issue between the parties. This is especially true of the testimony in rebuttal, which might well have been wholly omitted from the record. A large part of the examination of the witnesses is devoted to an explanation of the contract relations between the senior applicant in the cause, the uncle, and Mr. J. Leslie Rodgers, who had first entered into combination with the uncle to exploit his invention, and who had afterward transferred his assistance to the nephew, without any sufficient cause for the transfer apparent on the record; but these contract relations and the controversies growing out of them are all collateral matters, wholly independent of the issues here involved and serving to throw little or no light on these issues.

Then the record is further complicated with useless and irrelevant controversies between counsel, and explanations and recriminations that serve no useful purpose. Moreover, the contest is a family controversy: it is between uncle and nephew: the intimation is that either one has pirated the invention of the other: and the only substantial witnesses are members of the respective families of the parties and relatives of each other — on the side of the uncle, his sister-in-law and her husband; on the side of the nephew, his father and one of his brothers. The result is that the testimony is remarkably conflicting, and the matter of controversy is left in the greatest obscurity. And yet it would appear that it ought not to have been difficult to throw a more satisfactory light on the subject.

As stated, there are three counts in the issue. With reference to two of these, those numbered 1 and 2, we can have no hesitation in affirming the decision of the Patent Office which awards judgment of priority of invention to John Emmerson Scott, the uncle and the senior applicant in the cause. The testimony of the nephew wholly fails to show any conception by him of the subject-matter of these two counts, or of either of them, at any time before the filing of his application. In fact, we understand that the invention of

count numbered 1 of the issue has been virtually conceded to the uncle. We will dismiss both these counts from further consideration.

Count numbered 3, which is more general than count No. 1, and which may be said to embrace it, as a generic does a specific invention, may be regarded as the only thing here in controversy. It is for a thimble with spurs in the sides adapted to engage with the side walls of the spindle-socket of the last, while count 1 requires these spurs to be at diametrically opposite points, and to extend within the bore of the thimble.

After a minute and elaborate investigation of the junior applicant's testimony and numerous exhibits filed by him, the board of examiners of the Patent Office came to the conclusion, in which we concur, that in no one of his models and exhibits, except one designated as "Exhibit No. 11," was the invention of the third count of the issue embodied. It is unnecessary for us to go over that ground again. We are entirely satisfied with the analysis of the record made by the board, in consequence of which this conclusion was reached. But the junior applicant's "Exhibit No. 11" does embody the invention in controversy; and it is sufficiently proved that this exhibit was made and shown, and the invention, therefore, disclosed by him in July of 1895.

But it is proved with at least equal or greater sufficiency that the senior applicant had the same invention in 1893, and that he reduced it to practice in September of 1897, while it would seem that the junior applicant had never reduced it to practice before the filing of his application. Assuming, therefore, that the testimony of the parties, other than the applicants themselves, is entitled to equal credit on both sides — and we find no reason to refuse it to them — we find that the uncle's conception of the invention antedated that of the nephew by about two years. And, as there is no question here of undue delay or want of due diligence, it is very plain to us that there is no apparent error in the award of judgment of priority of invention to the senior applicant.

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Then again, the circumstances and conduct of the parties, as evidenced by the record, all tend to warrant the same conclusion. The germ of the invention beyond question belonged to the uncle, and not to the nephew. The latter admits that his own efforts in the field of invention had been superinduced by a knowledge of his uncle's device; and, indeed, the conceded fact that the uncle filed a *caveat* in 1890 for an invention, which, although not that of the issue, yet led up to it, is sufficient to raise a presumption, not very strong, it is true, but yet a presumption, in favor of the uncle's priority. More important, however, is the fact that, when in May of 1898 the uncle informed the nephew that he had applied for a patent on the invention, yet the nephew made no protest, and signified neither by word nor by act that the invention was his own. Then, if ever, he should have spoken. He seeks to excuse his silence on two grounds — one, that he relied on his uncle's assurances to make the matter all right with him; and the other, that he feared that his uncle, who was foreman over him in the shop in which both were employed, would discharge him in the event that he complained. Both excuses are unsatisfactory. The record discloses no just ground for the apprehension that he would be discharged; he was not discharged when he made his application in this case. And if his reliance on his uncle's assurance that he would make things all right with him, was a factor in inducing him to remain silent in May of 1898, it is not apparent why it should not have been equally potent in February of 1899, when he filed his application, and when, so far as the record shows, nothing had happened in the meantime to shake his reliance. It is not difficult to find a motive in the record for the change of attitude; but it is not made apparent to us that the change was warranted by any change in the uncle's course of conduct.

We have not deemed it necessary to analyze at any length the great mass of testimony in this case. This has been satisfactorily done by the tribunals of the Patent Office. We think that the case can be properly disposed of on the salient facts which we have noted.

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It is our conclusion that there was no error in the decision of the Commissioner of Patents in the premises, whereby he awarded judgment of priority of invention on all the counts of the issue to the senior applicant, John Emmerson Scott, the uncle; and that this decision should be *affirmed*.

The clerk of the court will certify this opinion, and the proceedings in this court in the premises, to the Commissioner of Patents according to law.

A motion for a rehearing was overruled.

PALMER v. COLLADAY.

COMMITTING MAGISTRATES; HABEAS CORPUS; CIVIL SERVICE, FRAUD UPON.

1. In reviewing the action of a committing magistrate, on *habeas corpus* the courts may go into the merits of the case and where the evidence shows the order of commitment to be void, or that an offense could not have been committed, by reason of the undisputed facts, the prisoner should be released; but where the magistrate is shown to have acted in good faith and there is room for a trial court to hold that an offense has been committed by the petitioner, under any law, the order of the magistrate committing to jail for default in giving bail, is a proper and valid judgment, and should not be disregarded in a collateral proceeding.
2. Where a committing magistrate before whom a party was charged with attempting to defraud the United States by co-operating with a candidate for appointment in the Civil Service in making a false statement as to the eligibility of such candidate for appointment, held the prisoner to bail to await the action of the grand jury, a preliminary examination having been waived, an order of the lower court discharging the prisoner from custody upon *habeas corpus* proceedings instituted by him, was *reversed* upon the ground that the showing made before the Commissioner was of such a character as to justify his action.

No. 1071. Submitted May 10, 1901. Decided June 18, 1901.

HEARING on an appeal by the United States marshal from

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Statement of the Case.

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an order of the Supreme Court of the District of Columbia, discharging the petitioner in *habeas corpus* proceedings from custody. *Reversed.*

The Court in the opinion stated the case as follows:

The appellee, Edward F. Colladay, presented a petition for a writ of *habeas corpus* to one of the justices of the Supreme Court of this District, stating that he was unlawfully restrained of his liberty by said appellant, to whose custody he had been committed by Samuel C. Mills, a United States commissioner, said commissioner having bound him over to await the action of the grand jury, for an alleged offense of forgery, under section 5418, Revised Statutes United States. A copy of the charge made to said commissioner, is attached to and filed with the petition.

The writ was issued, and the marshal made a return thereto, stating that he held said petitioner for delivery to the warden of the jail, by virtue of a commitment issued by said commissioner; and he attached a copy of the commitment, affidavit and warrant of arrest, and referred to the fact that the papers showing the proceedings before the commissioner were returned to the clerk's office of the said Supreme Court; and that \$500 bail had been fixed by the commissioner, in default of which petitioner was committed to respondent's custody, for delivery to the said warden.

It appears from the affidavit, made before said commissioner, by one William S. Washburn, on January 28, 1901, that the appellee, Edward F. Colladay, is charged substantially with unlawfully designing and intending, by means of fraudulent representations, to be made to the Civil Service Commission, to procure the entry of the name of Katherine C. Masterson, upon the list of eligibles for position as a skilled helper in the government printing office, which position was in the classified service of the United States, under the provisions of the civil service act of January 16, 1883 (20 Stat. L. 403).

That there were two lists of eligibles, one list embracing

those shown to be qualified by having the necessary education, and the other list those having the necessary education, and also having practical experience in the particular line of work, the appointments being made from this last-named list in preference to the other. That said Colladay, to assist said Masterson by procuring her name to be entered on the preferred list, on the 23d day of August, 1900, did cause and procure to be made by her, for presentation to said commission, a certain false paper writing, which is copied in the affidavit, wherein she falsely stated that she had previously been employed, as a folder and sewer, with the Globe Printing Co., for an aggregate period of two and a half years, for the purpose of defrauding the United States; and by such causing and procuring to be made of such false paper writing, which said Colladay knew to be false, he became a principal in the making thereof for the purpose of defrauding the United States within the meaning of the said section 5418.

At the hearing before the commissioner, an examination was waived, and said Colladay was required to give bail for his appearance in the criminal court, in default of which he was committed.

On the hearing of the return of the writ of *habeas corpus*, the petitioner was discharged from custody; and from that order the said marshal appealed to this court.

Mr. Thomas H. Anderson, United States Attorney for the District of Columbia, and *Mr. Hugh T. Taggart*, Assistant United States Attorney for the appellant.

Mr. A. A. Birney, *Mr. Henry F. Woodard*, *Mr. John C. Chaney* and *Mr. Alphonso Hart* for the appellee.

Mr. Justice BARNARD, Associate Justice of the Supreme Court of the District of Columbia (who sat with the court in the hearing of this cause in the absence of *Mr. Chief Justice ALVEY*), delivered the opinion of the Court:

If the prisoner is discharged from custody on the hearing on a writ of *habeas corpus*, such order or judgment, amounts

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to an adjudication, and is conclusive :
res adjudicata, if he should be again
fact could be shown for holding him
the time of his discharge. *United Sta*
Fed. Rep. 277; 1 Freeman on Judgm
on *Habeas Corpus*, Sec. 386.

The case will be deemed *res adjud*
necessarily involved, whether they we
or not. *Perry v. McLendon*, 62 Ga. 1

In this case, the petitioner had waiv
amination before the United States
thereby, in effect, had admitted the tru
in the affidavit, or charge made for hi
question to be heard and determined
sioner was the question of the probab
facts to constitute an offense under t
under any other statute of the United
common law.

If there was any law violated by the
of the facts stated, it was the duty of
admit him to bail, or to commit him t
tion of the grand jury. This would
only appeared that there was probabl
him guilty of an offense. *Ex parte*
200; *United States v. Johns*, 4 Dallas, 4
States, 143 U. S. 570; *Williams v. Un*
382.

The court will not, on *habeas cor*
merits of the decision of the commit
has before him any competent legal ev
criminate the defendant, on which to
In re Cortes, 136 U. S. 330; *Horner*
U. S. 577.

The object of the writ of *habeas*
whether or not the prisoner can be le
tody, and if the Government shows su
detention, he will not be discharged f
inal arrest or commitment. *Nishimura*

142 U. S. 651; *Iasigi v. Van de Carr*, 166 U. S. 391; *Price v. McCarty*, 89 Fed. Rep. 84; *Ex parte Watkins*, 3 Pet. 201.

The statute (Sec. 752, Revised Statutes United States) says the several justices and judges shall have power to grant writs of *habeas corpus*, "for the purpose of an inquiry into the cause of restraint of liberty."

If there is sufficient cause, the court will not discharge the petitioner, because of errors by the committing magistrate. *Ex parte Bollman*, 4 Cranch (U. S.) 114; *In re Bennett*, 2 Cr. C. C. 612.

We think the Supreme Court has announced the correct principle for this and like cases in its opinion in *Horner v. United States*, 143 U. S. 570, which was an appeal by Horner from an order remanding him to the marshal, on *habeas corpus*. It was there held, that it was not proper for the court to determine, on such writ, whether the scheme stated in the writing in evidence was a lottery or not, as that was the question properly triable by the court wherein the indictment should be found.

The appellant's case was considered as being in the regular course of criminal adjudication, the United States commissioner having jurisdiction of the subject-matter involved, and of the person of Horner, and the grand jury, it was said, would have like jurisdiction. Whether the facts stated constituted a lottery or not, it was held, is not for the court to determine, in advance, on *habeas corpus*. If an inferior court or magistrate of the United States has jurisdiction, a superior court of the United States will not interfere by *habeas corpus*. *Ex parte Mason*, 105 U. S. 696; *Ex parte Carll*, 106 U. S. 521; *Ex parte Wilson*, 114 U. S. 417; *Wales v. Whitney*, 114 U. S. 564; *Ex parte Harding*, 120 U. S. 782; *Benson v. McMahon*, 127 U. S. 457; *In re Coy*, 127 U. S. 731, 758; *In re Cortes*, 136 U. S. 330; *Stevens v. Fuller*, 136 U. S. 468, 477, 478, and cases there cited.

The same reasoning appears in the cases of *Re Chapman*, 156 U. S. 215; *In re Belt*, 159 U. S. 95; and *Minn v. Brundage*, 180 U. S. 499.

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A commissioner of the Circuit Court of the United States has power under section 1014, Revised Statutes United States, to arrest and imprison, or bail any offender, for trial before the proper court, for any crime or offense against the United States.

In such case it is made the duty of such officer to return copies of the process as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case.

By section 1019, Revised Statutes United States, such commissioner is authorized to require better security when a party admitted to bail is about to abscond, or in default of which, to commit him to prison; and the order for his arrest may be indorsed on the former commitment, or new warrant issued, stating the cause thereof. These sections seem to authorize such commissioners to exercise judicial discretion in the matter of the apprehension of offenders, and in detaining them, in an orderly way, until the grand jury can inquire into the facts of the case; and if their action is within the lines laid down for them, their orders ought to be respected by the courts, in any collateral inquiry. They are not supposed to act in such matters with as much deliberation and certainty as a trial court. There may be nice questions as to guilt, by reason of the facts stated in any given case; or fine questions as to the proper construction of the criminal statutes which are supposed to be violated by the admitted acts of the accused; but in all such cases it would appear to be proper for those questions to be raised in, and decided by, the trial court, in the progress of orderly criminal adjudication, rather than to have them passed upon, in advance on *habeas corpus*, with such facts only brought to the attention of the judge at chambers, as were presented to the commissioner to hold to bail. Where no new facts are brought to the attention of the justice, his action on the writ of *habeas corpus* is in the nature of appellate action; but it is not the purpose of the law that this writ shall be used for an appeal, or writ of error.

If the facts charged might be an offense against any statute,

the order releasing the petitioner from custody would prevent his prosecution; and hence it becomes an important question to determine just how far the courts should go in reviewing the action of a committing magistrate. There is no doubt but they may go into the merits of the case on *habeas corpus*, and if the evidence shows the order of commitment to be void, or that an offense could not have been committed, by reason of the undisputed facts, of course the prisoner should be released. Where, however, the magistrate is shown to have acted in good faith, and there is room for a trial court to hold that an offense has been committed by the petitioner, under any law, the order of the magistrate committing to jail for default in giving bail, is a proper and valid judgment, and should not be disregarded in a collateral proceeding.

It may be determined in the progress of this case, should it be investigated by the grand jury, that in order to make out an offense under said section 5418, or section 5479, a technical forgery as known at the common law, must be shown; but still there is room for difference of opinion on that proposition, when the purpose of the said sections, and all their contents, and relative provisions, are considered.

Forgery is briefly defined by some common-law authorities as the "making, *malo animo*, of any written instrument for the purpose of fraud and deceit." 2 East's Pleas of the Crown, 852. The court uses this language in the case of *United States v. Staats*, 8 How. 41:

"A genuine instrument containing a false statement of facts, used in support of a claim, the party knowing it to be false, and using it with intent to defraud, presents a case not distinguishable in principle or in turpitude, or in its mischievous effects, from one in which every part of the instrument is fabricated; and when the one is as fully within the words of the statute as the other, we may well suppose that it was intended to embrace it."

However this may be regarded, there is, as it seems to us, probability that the facts stated may constitute an offense under the provisions of section 5440, Revised Statutes United

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States, relating to conspiracy, "to defraud the United States in any manner or for any purpose."

It is claimed by appellee that to defraud the United States, must mean to deprive it of money, wrongfully, or of something of money value; and that a falsehood or trick by which its officers are deceived in the matter of selecting those who are to perform work for it, could not be a fraud against the United States. We do not agree to this proposition.

The Civil Service Commission is a legal agency of the United States, created by act of Congress; and through it the President undertakes to find and appoint such persons as may best promote the efficiency of the civil service; and to that end regulations are prescribed by means of which the age, health, character, knowledge, and ability for the branch of service into which he seeks to enter, of each candidate, may be fully ascertained.

If falsehoods are imposed upon the persons charged with the duty of ascertaining these qualifications, and made to take the place of facts, then the United States is defrauded; is deprived by deceit of the knowledge justly due to its officers in the proper discharge of its business, and it is thereby liable to obtain a less efficient employee.

We think the trial court may properly hold that the appellee's alleged conduct, in co-operation with the candidate in this case, in making a false statement as to her past experience, constitutes an offense under this section 5440; and that such attempt at deception, if successfully carried out, would defraud the United States, within the meaning of the law. *United States v. Bunting*, 82 Fed. Rep. 883.

We do not wish to be understood, however, as laying down any rule of action, or method of construction, by which the trial court should feel bound; but what we decide is, that in our judgment, the facts presented to the United States commissioner, by the affidavit filed in this case, were of such a character as to justify his order, holding the accused to bail, to await the action of the grand jury; and if an indictment should be found, then all the questions sought to be raised on this *habeas corpus* proceeding could be properly

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raised in the further progress of the cause in the trial court, and the judgment of that court would be subject to review on appeal, if errors were committed.

It follows from these views, that the order discharging the appellee from custody, must be *reversed*, and the cause *remanded with directions to dismiss the writ of habeas corpus*.

MERTZ v. DISTRICT OF COLUMBIA.

BUILDING REGULATIONS; PERMITS.

Where the proprietor of a store cuts a door in a partition wall between his store and the entrance of an adjoining theatre, without applying for or obtaining a permit from the building inspector, he is properly convicted in the police court of violating section 182 of the building regulations, relating to theatre entrances and their construction, and is also guilty of violating section 20 of the same regulations, which requires the building inspector to determine whether an intended repair to a building is such as to require a formal permit.

No. 1074. Submitted May 16, 1901. Decided June 18, 1901.

IN ERROR to the police court of the District of Columbia.
Judgment affirmed.

The facts are sufficiently stated in the opinion.

Mr. Sidney T. Thomas for the plaintiff in error.

Mr. Andrew B. Duvall, Attorney for the District of Columbia, and *Mr. Clarence A. Brandenburg*, Assistant Attorney for the defendant in error.

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Mr. Justice BARNARD, Associate Justice of the Supreme Court of the District of Columbia (who sat with the court in the hearing of this cause in the absence of Mr. Chief Justice ALVEY), delivered the opinion of the Court:

This case comes here on a writ of error from the judgment of the police court of the District, wherein the said plaintiff in error, Edward P. Mertz, was found guilty of violating a provision of the building regulations, and sentenced to pay a fine of \$10.

From the bill of exceptions it appears, that said plaintiff cut a door in the partition wall between his store and the F street entrance to the Columbia theatre, on March 19, 1900, without a permit from the inspector of buildings. It also appears that such opening did not affect the strength, or stability, of the building; did not increase the cost of insurance against fire; and that its presence does not endanger public safety.

The plaintiff in error claims that the cutting of said door is a minor repair, such as does not require a permit; and that cutting the door without a permit was not, therefore, an unlawful act.

He also claims that the building regulation said to be violated is unreasonable and, therefore, void, if intended to apply to a case such as this is shown to be by the evidence.

By the joint resolution of Congress passed February 26, 1892 (27 Stat. L. 394), the licenses of theatres or other public places of amusement in the city of Washington, were terminated, unless compliance should be made by the holders, within ten days, with such regulations as the commissioners might prescribe for the public safety.

The second section of the said resolution authorizes the commissioners to make and enforce all such reasonable and usual police regulations as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the District of Columbia.

By virtue of the powers vested in them under this resolu-

tion, said commissioners adopted certain regulations, entitled:

"Regulations for the public safety in theatres and other public places of amusement and assembly in the District of Columbia."

These are found in the collection of "building regulations" of 1897, beginning with section 173, although they may properly be classed in many respects with the "police regulations." Section 182 contains this provision:

"Every approach to, or exit from a theatre or other place of amusement, *through any other building*, shall have inclosing walls of brick, stone or iron, and floors and ceilings of approved incombustible, fire-resisting materials, *and there shall be no opening through* said walls, floors, or ceilings."

As shown by the bill of exceptions, we must assume that as matter of fact, the cutting of the door in this case, while the store is occupied by the plaintiff in error in the manner stated, does not endanger public safety.

Is that a sufficient cause, however, to authorize the court to set aside the regulation, made by the authority of Congress, and by the public officers specially charged with the duty of providing general rules for public safety in connection with theatres and other places of amusement, where there may be large numbers of people assembled?

It is the exercise of care, which the commissioners are charged to do, to provide against any probability or possibility of fire or panic in, or at the entrance of a theatre, where crowds are so frequently assembled; and if in their judgment the general regulation quoted, will best protect the public, should the court set it aside in a special case, where its nonobservance might not endanger public safety?

If after the door is held to be properly there, the store of Mr. Mertz should be used for other purposes than those for which it is now used; or if it should be rented to some one for a more dangerous business, and by reason of such dangerous use a fire should occur therein, while the people were in the theatre, or just going out, there would be great danger of injury to those in that entry-way, not

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only from fire and smoke coming through the door and filling the room, but from panic and crowding. This unforeseen possibility is better guarded against, if the regulations should be strictly observed and no door, or other opening, should be allowed in the walls of this deep vestibule, or entry, to the theatre.

A change of tenant might take place any time, without the knowledge of the commissioners; so that the regulation must be considered with a view to all kinds of tenants, and not alone as to Mr. Mertz and the drug store.

If a fire should occur in the theatre itself, while filled with people, they should have as safe a way provided for escape to the open street, as the circumstances of the case would permit; and the commissioners, in the exercise of their discretion, have evidently concluded that such safety will be provided by the enforcement of this regulation.

These regulations are not made from prejudice to any particular person, or for the purpose of favoring any person; but they are made in the interest of the whole community; and unless the individual citizen who claims to be aggrieved thereby, can point out unmistakable grounds for interference by the courts, such regulations ought to be upheld for the general welfare.

These regulations are undoubtedly within the powers conferred on the commissioners by the said joint resolution; but beyond these the said commissioners were authorized by act of June 14, 1878 (20 Stat. L. 131), to make and enforce such "*building regulations*" for the said District as they may deem advisable, and that said regulations so made shall have the same force and effect within the District of Columbia as if enacted by Congress.

Under this grant of power, they have provided by section 20 of the regulations that permits are not required for minor interior *repairs*, where there is no interference with the construction of the building; but in every such case the fact is to be determined by the inspector of buildings; so that his office must be informed of all such contemplated repairs, and he must determine whether it is a matter that requires a

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formal permit; and if so, under what restrictions and safeguards such permit shall be granted.

In the present case, the plaintiff in error made no such application, and so the judgment of the officer specially charged with the duty of deciding whether such *repair*, (or more properly, *alteration*), was allowable or not, was not obtained. His act in cutting the door without informing the inspector, was a violation of this provision, as well as of said section 182.

We do not think either of these requirements unreasonable, and we find no error in this record; and the judgment of the police court will, therefore, be *affirmed, with costs, and it is so ordered.*

THE BALTIMORE AND OHIO RAILWAY COMPANY

v.

WINSLOW.

TRUSTS AND TRUSTEES; LEASES; ESTOPPEL; CONDEMNATION OF LAND; SPECIFIC PERFORMANCE.

1. *Quære*, whether trustees to whom land has been devised in trust for the sole and separate use of a married woman for life with the right in her to have the use and occupation thereof, to receive and receipt for the income therefrom without the intervention of the trustees and to direct a sale thereof and investment of the proceeds, have the right with the assent of the life tenant, to provide in a lease of the land to a railroad company, that the company shall have the right thereafter to purchase the property in fee-simple, with a good and valid title, for a specified sum of money.
2. It is not necessary to the validity of a lease of land that the lessee should have joined in its formal execution by signing it.
3. Where, by a series of leases and renewals, land has been leased to a railroad company by trustees to whom it was devised in trust for

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the sole and separate use of a married woman for her life, and she has received the rent reserved, neither she nor the trustees, after the term created by the last lease has expired, will be permitted in equity to repudiate the leases because the life tenant failed to join in the execution of some of them, and because but one of the three trustees executed the last one, one of his co-trustees having been abroad and the other having resigned his trust and been relieved and discharged therefrom.

4. Where, under a lease of land to a railroad company, containing a provision which is not enforceable, giving the company the right to purchase the land for a specified sum, the company is given a license to enter upon the land and construct its road, and does so, an action at law by the lessor for the dispossession of the company will be enjoined in equity, if the company is willing to make compensation for the use and occupation of the land, such compensation to be fixed by condemnation proceedings.
5. Where trustees to whom has been devised land for the sole and separate use of a married woman for life have agreed in a lease thereof to a railroad company to sell the land to the company, for a specified sum, and it is doubtful whether they had authority to enter into the contract for sale, and the company has the power to acquire the land by condemnation, specific performance of the contract of sale will not be decreed.

No. 1067. Submitted May 24, 1901. Decided June 18, 1901.

HEARING on an appeal by the complainant from a decree of the Supreme Court of the District of Columbia dismissing a bill in equity to enjoin proceedings at law. *Reversed.*

The COURT in its opinion stated the case as follows:

This is a suit in equity instituted in the Supreme Court of the District of Columbia by the Baltimore and Ohio Railroad Company, the appellant here, as complainant, against the appellees, as trustees under the will of Catherine Pearson, deceased, to enjoin certain proceedings at law begun by said trustees to recover the possession of lots numbered 9, 10, 11 and 12, in Square 710, in the City of Washington, held by said railroad company, and over which the tracks of its Metropolitan branch are constructed.

Catherine Pearson, who died prior to August 1, 1872, and who, at the time of her death, was the owner of the lots

of ground mentioned left a will whereby she, after some bequests not here important to be stated, devised all the rest and residue of her estate, which included the lots in question, to trustees therein named upon certain specified trusts. It is this portion of the will which enters into the present controversy; and it reads as follows:

“All the rest and residue of my estate, real and personal, wheresoever situated, I give and devise to Carlisle P. Patterson, William H. Philip and Walter S. Cox, or the survivors or survivor of them, to be by them held as trustees for the sole and separate use of my dear daughter Eliza Patterson during the term of her natural life, and so that the same shall not be liable for the debts or subject to the control, contracts or engagements of her present or any after-taken husband; to permit her by herself, or her special attorney appointed in writing to be signed by her, to receive the annual income and profits of the same for her own sole and separate use, her receipt or that of her attorney so appointed as aforesaid alone to be an acquittance to the person or persons charged with the payment of such income or any part of the same and to the extent only therein expressed to have been paid; and if she pleases to occupy, possess, and use for her own account, accommodation, and convenience and that of her family any part of the property, real and personal, so held for her separate use and benefit, she shall be allowed to do so; and if at any time the said Eliza Patterson shall, in writing to be signed by her in the presence of and to be attested by a subscribing witness, desire the said Carlisle P. Patterson, William H. Philip, and Walter S. Cox, or the survivors and survivor of them, to sell any part of the estate, real and personal, held by them for her separate use, for the purpose of changing the investment thereof, it shall be lawful for the said named trustees, or the survivors and survivor of them, to sell the same for such purpose, and to transfer and convey the absolute estate in fee therein, to the purchaser thereof; and to invest the same in such manner as the said Eliza W. Patterson may require; and such new investment shall be held by the said trustees for the same use,

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trusts and purposes and with the same powers and authority of sale and reinvestment as is herein declared of and concerning the original trust subject and separate estate.

“ And after the death of the said Eliza W. Patterson the said named trustees and their successors shall hold the said trust subject and separate estate, original and subsequently acquired by sale and reinvestment, for the use and benefit of any child or children of the said Eliza W. Patterson, and the issue of any child or children of the said Eliza who may die leaving issue in the lifetime of said Eliza, and such issue shall take the share or portion of the said estate which their parent or parents would have taken had they survived the said Eliza. And if the said Eliza W. Patterson shall die without leaving a child or children, or issue of any child or children, living at the time of her death, the said trustees and their successors shall hold the said trust subject and separate estate for my right heirs. And if it shall happen that either of the said trustees shall die, or become incapable of acting, or shall refuse to act in the execution of said trusts, then and in every such case, the continuing trustees or trustee shall from time to time nominate some other person or persons, to be approved by the said Eliza W. Patterson, to be trustee or trustees in the place and stead of the person or persons so dying or becoming incapable or refusing to act, and shall convey and settle the said trust subject and separate estate in such manner that the same shall be legally vested in such continuing trustees or trustee, and such person or persons so named and appointed to that office for the same use, trusts and purposes and with the same power and authority of administration, sale and reinvestment, as is hereinbefore declared of and concerning the said trust subject and estate, and the said new trustee or trustees shall have the same power to act in the premises in conjunction with the continuing trustees or trustee and as survivors of them, as if they had been originally named trustee or trustees in the premises in this my last will and testament.”

This will purports to have been executed on December 4, 1862. Of the trustees named in it Carlisle P. Patterson was

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the husband of the beneficiary, Eliza W. Patterson, who yet survives. He has departed this life, as has also his co-trustee, William H. Philip; and the third trustee, the Hon. Walter S. Cox, late one of the justices of the Supreme Court of the District, has resigned and been discharged from the trust. In their places the appellees, Francis Winslow, a son-in-law of Mrs. Eliza W. Patterson; Augustus Jay, a grandson of the testatrix Catherine Pearson, and the American Security and Trust Company, a body corporate in this District, have from time to time been appointed; and they now hold the trust estate mentioned under the will of Catherine Pearson.

By an act of Congress of July 25, 1866 (14 Stat. 250), the Baltimore and Ohio Railroad Company had been authorized to extend the Metropolitan branch of its road into the District of Columbia, with the same rights as it held in Maryland, including the right to acquire property by purchase or condemnation for the construction and use of the road; and subsequent statutes empowered it to extend said branch into the city of Washington over a specified route. This route comprised the lots of ground hereinbefore mentioned. While the railroad company was engaged in the construction and completion of this work, instead of acquiring the lots in question by condemnation, it entered into a lease with the trustees under Mrs. Pearson's will, who were then the original trustees named by the testatrix, whereby the trustees leased the lots to the railroad company for a term of five years from and after August 1, 1872, on the payment of the yearly rental of \$755.55 in each and every year, with the privilege to the railroad company to purchase the property at any time during the term for the sum of \$12,592, and to receive a good and sufficient deed thereof; and with the further privilege that, at or before the expiration of the term, on the request of the railroad company, the trustees would renew the lease, with the same agreements and privileges, for another term of five years, or until such time as they would be prepared to convey the premises with perfect title in fee-simple; and also with the further provision that, in the event

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of the omission of the railroad company to make a request for the renewal of the lease at or before the expiration of the term, the trustees were required to notify the company of such expiration, and to request it to exercise its election to renew the lease, and the privilege of renewal should continue for three months after such notice.

There seems to have been no formal renewal of this lease at the time of its expiration in 1877; at least no renewal is disclosed by the record. But on February 1, 1883, another lease to the railroad company for a term of five years from and after August 1, 1883, was executed by the then existing trustees, Walter S. Cox, Augustus Jay and Francis Winslow, with whom the beneficiary, Mrs. Eliza W. Patterson, herself also joined in the execution of the instrument, wherein there was no reference to any previous lease, but the rent reserved was the same as in the lease of 1872, that is, \$755.55 a year, as were also the privileges for purchase at \$12,592, and for further renewal.

Again on January 30, 1888, another lease, identical with the last in every respect except the dates, and except also, that Mrs. Patterson herself did not execute it as a party, was executed by the same trustees and the railroad company for a term of five years from and after August 1, 1887.

On October 17, 1892, a new lease, identical in terms with the previous one and purporting to be made by the same trustees, for a further term of five years from and after August 1, 1892, was executed and delivered to the railroad company by Francis Winslow alone, as trustee. It would seem that Mr. Justice Cox had then withdrawn from the trust and no successor to him had been appointed, and that the other trustee, Jay, was absent in Europe, where he had become domiciled; so that Winslow at this time, although himself often absent from the District of Columbia and from the United States, remained the only active trustee.

No other formal lease seems to have been executed. But on August 4, 1897, three days after the expiration of the last mentioned, the railroad company notified the trustees of its desire for a renewal for a further term of five years. To

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this request Mr. Justice Cox replied that he was no longer trustee, and that Jay was absent in Europe; and he referred the company to Winslow as the acting trustee. Winslow, in course of time, answered the request in the following terms in a communication to one of the attorneys for the company:

"My understanding is that originally the railroad company, wishing to purchase the property, could not do so on account of some deficiency in the title. The immediate use of the property being necessary, a lease was made, but in such form as would compel the transfer of the lots at the price agreed whenever a clear title could be given. Pending the transfer, the railroad company was to pay 6 per cent. on the deferred payment. The renewal of the lease has always been made under the same reciprocal conditions and obligations, and I do not feel authorized to change them; but I suggest, as we are now able to furnish a satisfactory title, the present is a suitable time to transfer the property. I inclose a more formal notice in reply to a letter received from the railroad authorities."

The more formal notice referred to was in the following terms:

"In reply to your letter in relation to the renewal of the lease of the lots in Square 710 in this city, I beg to say that we are now prepared to convey the property with a perfect title, and prefer executing such conveyance to renewal of the lease."

This was on September 27, 1897. During the whole period from the beginning of the first lease in 1872 it seems that checks for the rent as it became due were drawn by the railroad company to the order of the trustees and were indorsed by the trustees, or by one of them in the name of all, to Mrs. Eliza W. Patterson, who was entitled to receive the money under Mrs. Pearson's will. Frequently Mrs. Patterson was in communication with the officers of the railroad company with reference to these checks, and how they were to be drawn, and where they were to be sent. These communications continued as late as February 5, 1898, on which

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day she requested some modification of a check that had been sent to her on account of the absence both of Jay and Winslow, the trustees, from the United States; and she continued to receive the rent, which seems to have been paid semi-annually, up to August 1, 1898.

On August 12, 1898, a check was sent to Winslow, trustee, by the company, for \$377.77, apparently for the semi-annual rent due and payable on August 1, 1898. This check was received by Winslow, but not cashed; and on inquiry by the company in regard to it in January of 1899, Winslow wrote, under date of January 31, 1899, the following letter to the company's treasurer:

"I am in receipt of your letter of January 20th in relation to the voucher for rent for the premises in Washington. The voucher was received, but pending advice of counsel no action was taken in regard to it. I am advised that the company are and for some time have been only tenants at sufferance; and I have notified Mr. McCubbin (land agent of the company) of that fact, and invited a proposition from the company. Pending a more definite arrangement than now exists, I do not feel justified in accepting payments without the company's full understanding of my position, and have therefore suspended action on the voucher."

Further correspondence ensued between Winslow and the land agent of the company, of which the result was that the company first requested a new lease and finally tendered itself ready and willing to pay the purchase money, the sum of \$12,592, specified in the agreements heretofore mentioned, upon the execution and delivery to it of a proper deed; and that Winslow declined both propositions, with this statement: "We prefer to sell the property rather than lease it, but neither in case of sale or lease could we be governed by conditions or prices existing some twenty-five years ago." It appeared that the property had become appreciated in value, the testimony in the record being that it is now worth upwards of \$30,000.

There were further negotiations continued until about the end of February, 1900, without definite result or special

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bearing upon the controversy as it now stands before us; and they need not, therefore, be here stated.

Finally the controversy culminated in legal proceedings. On March 8, 1900, in pursuance of a previous notice to quit, the appellees here, as the existing trustees, instituted proceedings before a justice of the peace to dispossess the company and to recover possession of the property. The company, not desiring to have two trials, permitted judgment to be entered by the justice by default, and forthwith appealed from such judgment to the Supreme Court of the District of Columbia, wherein the cause is yet pending. Subsequently, and while the said proceeding was so pending, the company instituted the present suit by filing its bill in equity to restrain the said proceeding at law, and also another suit which had been instituted to recover for use and occupation; and also to have a conveyance of the property at the price and according to the terms of the lease of August 1, 1872, and the several subsequent renewals thereof; and, if necessary, for a further renewal lease for five years from August 1, 1897; and also for general relief.

There was a temporary restraining order issued, which was afterwards continued to the final hearing. Thereupon answer was filed, and testimony was taken. At the final hearing, the court below dissolved the injunction and dismissed the bill of complaint; and from the decree the present appeal has been prosecuted.

Mr. George E. Hamilton and Mr. M. J. Colbert for the appellant:

1. A great deal of stress is laid upon the fact that the lease of October 17, 1892, was signed by only one of the trustees — Mr. Winslow. As a matter of fact — and it appears from all of the correspondence — Winslow was the managing trustee, and at this time the only trustee in this country. As shown from the record, Mr. Jay, the other trustee, was continuously absent in Paris, and apparently was a trustee in name only, and Winslow had the authority

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to receive these drafts made payable to his order, and to collect and apply the proceeds. In other words, from the written acts and transactions evidenced in writing, Winslow was the agent of the other trustee for the purpose of attending to this business, and his acts with regard to the lease of 1892 will be considered the acts of the other trustee. *Tiffany & Bullard on the Law of Trust and Trustees*, 539 *et seq.*; *Ex parte Rigby*, 19 Ves. 463; *Sinclair v. Jackson*, 8 Cowen, 543; *Bowes v. Seegers*, 8 W. & S. 222; *Abbott v. The Rubber Company*, 33 Barb. 579; *Leggett v. Hunter*, 19 N. Y. (5 Smith) 445; *Messeena v. Carr*, 9 L. R. Eq. 260. And actions unauthorized, when performed by a single trustee, in respect to the trust estate, may be subsequently ratified and validated, either in writing or *in pais*, by his cotrustee. *Insurance Company v. Chase*, 5 Wall. (U. S.) 512; *Blanchard v. Waite*, 28 Me. 59. If, as we contend, the lease of 1892 was valid, then we were entitled, under its provisions, to a renewal of said lease in 1897.

2. Whatever may have been the defects in the agreement, or however wanting the trustees may have been in the power to sell, they, with Mrs. Patterson, stood by and permitted the company to construct its tracks, and they should not now be permitted to undertake or prosecute proceedings which would enable them to sever a line of commerce which, by their assent and even permission, was constructed over these lots and has been in operation for more than a quarter of a century. *McAulay v. Railroad Company*, 33 Vt. 311; *Railroad Company v. Reddick*, 17 A. & E. R. R. Cases, 107; *Pryzblowich v. Railroad Company*, 17 Fed. Rep. 493; *Goodman v. Canal Company*, 18 Ohio, 179; *Railroad Company v. Brown*, 37 Mich. 531. In the cases where ejectment had been brought and judgments obtained, courts have, by injunction, restrained execution on the judgment until the company could exercise its right of condemnation, or until, by proper reference, the right of the owners to compensation could be ascertained. *Railroad Company v. Bruce*, 10 A. & E. R. R. Cases, 1; *Railroad Company v. Heirs of Henry Stanley*, 35 N. J. Eq. 283; *Railroad Company v.*

Taylor, 22 A. & E. R. R. Cases, 123; *Railroad Company v. Turner*, 31 Ark. 494; *Provolt v. Railroad Company*, 57 Mo. 256; *Gray v. Railroad Company*, 81 Mo. 126.

Mr. Calderon Carlisle and *Mr. Wm. G. Johnson* for the appellees:

1. The bill is not maintainable against the trustees. Specific performance of contracts for the sale of real estate will not be decreed in all cases. The exercise of the power is discretionary and, it is submitted, will never be exercised to compel trustees holding a mere naked title to perform a contract by which the *cestui que trust* will be deprived of the beneficial estate. Not only are the trustees here mere naked trustees, but the beneficiary and remaindermen are not parties to the alleged contract, nor even parties to the cause, while complainant's own testimony shows the property to be worth from \$14,691.75 to \$18,889.25 more than the alleged contract price. *Jones v. Holladay*, 2 App. D. C. 279.

2. Even if the court could properly require specific performance by trustees in such a case, the record here clearly shows that there never was any valid contract of sale to be enforced. *Powles v. Jordan*, 62 Md. 499; *Richardson v. Crooker*, 7 Gray, 190; *Kissam v. Dierkes*, 49 N. Y. 602; *Alley v. Lawrence*, 12 Gray, 373; *Barber v. Cary*, 1 Kern. 397.

3. The provision for renewal in the lease does not avail the appellant. The several leases offered in evidence contain an agreement for renewal. This covenant does not amount to a perpetuity, but gives the right to but one renewal. *Hyde v. Skinner*, 2 P. Wms. 196 (1723); *Tritton v. Foote*, 2 Brown Ch. 636 (1789); *Moore v. Foley*, 6 Ves. Jr. 232 (1801); *Rutgers v. Hunter*, 6 Johns. Ch. 215 (1822); *Carr v. Ellison*, 20 Wend. 178 (1838); *Cunningham v. Pattee*, 99 Mass. 248 (1868); *Banker v. Braker*, 9 Abb. (N. S.) 411 (1880); *Syms v. The Mayor*, 105 N. Y. 153 (1887); *Taylor on Land. & Ten.*, Sec. 333. A further reason for limiting the covenant for renewal to a single renewal is the lack of

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power in the trustees to create a perpetual lease. A perpetual lease would bar the remaindermen's rights of possession and sale, and is, therefore, beyond the power of the trustees. Moreover, it would absolutely defeat the right, expressly given to the beneficiary of the trust, Mrs. Patterson, by the will.

4. All rights and pretense of rights in the appellant, under the several leases, expired July 31, 1897. That the act of Winslow, alone, could not bind his cotrustee and the estate committed to them and their beneficiary is well settled by authority. *Sinclair v. Jackson*, 8 Cow. 543; *Ridgley v. Johnson*, 11 Barb. 527; Hill on Trustees (3d Am. ed.), 445; *Latrobe v. Tiernan*, 2 Md. Ch. D. 474.

5. The gross inequity and lack of mutuality in the alleged agreement is a bar to its enforcement by a decree for specific performance. The trustees had no right to place the trust estate at the capricious disposition of the railroad company; they have not done so in fact; but, if they have, such an inequitable contract is not one which a court of equity will specifically enforce. *Gieger v. Green*, 4 Gill, 472; *Marble Company v. Ripley*, 10 Wall. 339; *Brashier v. Gratz*, 6 Wheat. 528; *Duvall v. Myers*, 2 Md. Ch. D. 401; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 274.

Mr. Justice MORRIS delivered the opinion of the Court:

The question principally argued before us in the case is, whether, in the execution of the lease of August 1, 1872, and of its subsequent renewals, the trustees of the estate of Catherine Pearson acted within the scope of their authority as such trustees, when they inserted, or caused to be inserted, therein the provision that the railroad company should have the right thereafter to purchase the property in fee-simple, with a good and valid title, at a certain specified sum of money; and this question we deem it unnecessary to determine. We may say, however, that such an arrangement entered into with a railroad company, armed with the power of the State to prosecute a great public enterprise, and em-

powered for that purpose to take property by the exercise of the right of eminent domain, may stand upon a somewhat different basis from a similar arrangement entered into with an ordinary purchaser. But however this may be, and we find it necessary to make no decision in regard to it, the power of the trustees, with the assent and concurrence of the beneficiary, to execute the leases which have been recited, except as to the provision for sale, is not open to reasonable doubt. The contention in that regard is that the leases in question were not properly and sufficiently executed by the parties in interest; that only in two cases has the railroad company joined in such execution, the leases of 1872 and 1888; that only in one instance, the lease of 1883, has the beneficiary, the life tenant of the property, joined; that the lease of 1892 was executed only by one of the three trustees, and is wholly invalid; and that all these leases are now at an end and wholly inoperative for any purpose.

We find no merit in this contention. There is no ground whatever in law for the assumption that the signature or formal execution of the railroad company was necessary to the validity of any of the leases; and as to the other objections it is sufficient to say that the life tenant of the property and the beneficiary of the trust during her life, who was and is the sole substantial party in interest, ratified and sanctioned all the leases in question, and has received for upwards of twenty-five years all the rent specified in them to be paid by the lessee. Neither she nor her trustees can now be permitted to repudiate them. Least of all, will a court of equity allow such repudiation. In equity at least, if not at law, the leases were her leases rather than those of her trustees; and we are not sure that she was not entitled to deal with the property without the intervention of any trustees, and to rent and lease the same at her pleasure, so as to render it productive of income. She was the life tenant, entitled to the use and occupation of the property in her own right, and to receive the income therefrom directly for her own use and upon her own acquittance or receipt, without the intervention of trustees, and for most of the time she was

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absolutely *sui juris*, a *feme sole*, and competent to deal with her own affairs as she thought proper. It is difficult, therefore, to see why she was not empowered, at all events in equity, to rent and lease this property at her own pleasure. The function of the trustees under the will of Catherine Pearson would seem to have been to secure her life estate and her use and enjoyment of the property from marital control and marital liability rather than to interfere with her management of the estate. In their assumption of such management they acted rather as her agents than as trustees having independent control of the property.

It is of no consequence, therefore, that Mr. Winslow alone executed the last formal lease that was given, that of 1892. He was then to all intents and purposes the sole trustee acting in the execution of the trust. Mr. Justice Cox had been relieved and discharged from the trust by decree of court of June 13, 1892; and Mr. Jay would seem to have become a nonresident of the District of Columbia and of the United States, and to have abandoned all active part in the administration of the trust, if, indeed, it required action on his part. Under these circumstances, Winslow's lease of the property, ratified by the life tenant and for the time being the sole beneficiary, who received and who has continued to receive to this day the consideration for it, which was the income contemplated by the will of Catherine Pearson, cannot now be questioned. Certainly it cannot be questioned in a court of equity, after the term created by the lease has expired and the beneficiary has derived from it all the consideration required in it to be rendered by the appellant.

Omitting from our consideration the clause of the lease of 1892 which provides for the privilege of purchase by the lessee of the property, which provision may for all present purposes be segregated from the instrument, we find no reason for holding that this lease is not a valid lease binding on the trustees of the estate and binding on the beneficiary and life tenant. The covenant for renewal therein contained is not an unreasonable or improper covenant; and we understand it to be conceded on behalf of the appellees that

it is a valid and binding covenant, and that the appellant is entitled to one renewal of the lease, if the lease itself is valid and binding. This concession, which is a just and proper one, dispenses with the necessity of any discussion of this point; and being of the opinion, as we have already stated, that the lease is a good and valid lease, it follows in our judgment that the appellant is entitled to the renewal of it from the first day of August, 1897, for the term of five years thereafter which it seeks under the bill of complaint in this case. Being so entitled, it is not liable to proceedings for dispossession or any other similar proceedings; and the proceedings instituted against it and which it is sought by this suit to restrain should be perpetually enjoined.

But there is another and a higher ground upon which our conclusion in this case can be based.

That the appellant entered upon the use and occupation of the property in controversy with a view to its purchase when such purchase could properly be effected, we think is very clear. And that this purchase was postponed for a time merely on account of some alleged or supposed deficiencies in the title, which could be removed, and which, if Mr. Winslow's statement in 1899 be correct, were in fact removed at or before that year, we think to be a fair inference from the record. What the character of the use and occupation of the land by the company was to be, and was understood by all the parties to be intended to be, we think also to be entirely clear. Over and through this land the railroad company constructed what is known as its Metropolitan branch, part of a great highway between Washington city, the adjoining States and the great West. This great highway is not a merely private enterprise, nor a matter of purely private concern; it is a public road, constructed for public purposes, under sanction of the public authority, and over which the public have rights, which cannot be permitted to be obstructed, much less destroyed, either by the company itself to which the franchise has been granted as a public trust to construct and operate this road, or by antagonistic parties claiming the ownership of the land upon

which it has been permitted to enter
 ment therefor, or as the result of an
 between the railroad company and suc
 clear that the appellees knew the purpo
 was needed, and for which it was sub
 used; and that, with full knowledge
 intending that such purpose should b
 they authorized the railroad company to
 and to construct the road thereon. The
 license so given to enter is to be found
 the time and the successive leases exec
 it is beyond question that such license v
 pany. This license was not solely for t
 road company, but primarily for the b
 which required this construction for its
 in effect a dedication of the land for a
 course, to the right of compensation th
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 destruction of the railroad company a
 of the franchise. It is well-settled law
 for the dispossession of the railroad
 maintained in such a case, if the compa
 compensation for the use and occupatio
road Co. v. Stanley, 35 N. J. Eq. 2
Bruce, 102 Pa. St. 23; *Taylor v. Railro*
Provolt v. Railroad Co. 57 Mo. 256; *R*
 31 Ark. 494.

. Assuming that there is grave doubt
 under the will of Catherine Pearson
 that will to enter into the contract o
 company, which they incorporated int
 we do not think that the contract is
 performance should be decreed in equ
 stances of this case. Even when a
 doubt, it is well-settled law that specific

always be decreed. Specific performance generally rests in the sound judicial discretion of the court of equity. In the present case the railroad company has another remedy, plain and adequate, whereby to preserve its own rights and those of the public in the premises, that of the exercise of the right of eminent domain vested in it by its charter and by the act of Congress which authorized its entrance into this city and District; and it is both its right and its duty to exercise that right by taking steps in the present suit or otherwise, as it may be advised, to ascertain the value of the use and occupation which it desires of the land in question and to make compensation therefor to the owners of the land. *Railroad Co. v. Stanley*, 35 N. J. Eq. 283; *Drury v. Midland R.R. Co.*, 127 Mass. 571; *Railroad Co. v. Bruce*, 102 Pa. St. 23; *Railroad Co. v. Johnston*, 59 Pa. St. 290; *Taylor v. Railroad Co.*, 63 Wis. 327; *Provolt v. Railroad Co.*, 57 Mo. 256; *Railroad Co. v. Turner*, 31 Ark. 494; *Gilman v. Railroad Co.*, 37 Wis. 317; *Railroad Co. v. Lewton*, 20 Ohio St. 401; *Trenton Water Co. v. Chambers*, 1 Stockt. 471; *Railroad Co. v. Booraem*, 1 Stew. Eq. 450.

The case of *Railroad Co. v. Stanley*, above cited, is directly in point. There the owners of land, on which a railroad company proposed to construct its railroad, entered into an agreement with the company for the use and occupation of the land by the latter, in consideration of the establishment of a depot or station thereon by the company, and certain arrangements for the running of trains. The company took possession of the land and constructed its railroad, but failed to build the station. It became insolvent, and its property and franchises were sold under foreclosure, and another company, organized under the general laws of the State, became the owner and possessor of them. Ejectment was instituted by the owners of the land against this latter company to recover possession of the property; and the company thereupon filed a bill in equity to stay the proceedings. The Court of Errors and Appeals of the State of New Jersey held that the complainant company was entitled to the injunction which it prayed.

The other cases cited are substantial and the principle established by them, of the owners of the land to repossess and just, and to afford a proper criterion of the case now before us.

In view of what has been said, we under the provisions of the lease of 1892 Winslow, trustee, for and on behalf of Eliza W. Patterson, the appellant was a renewal of such lease for the term of after the first day of August, 1897, upon conditions of said lease as to the rents to be that during the continuance of such term possession of the appellant can be maintained of opinion that, for the time subsequent of said renewed lease for which they require the use and occupation of said land entitled, and it is its duty, to acquire and occupation, under the exercise of the domain conferred upon it by the act of ascertainment of the value of such use and payment to the owners of the land of the so to be ascertained. And the bill of costs may be retained for the purpose of such value and just compensation.

It follows that the decree of the Supreme District of Columbia dissolving the injunction in this cause and dismissing the bill of costs *reversed, with costs; and that the cause be remanded to that court, with directions to vacate said injunction and make the same perpetual together and other proceedings as may be just according to law and in conformity with the decree so ordered.**

An appeal to the Supreme Court of the United States prayed by the appellees and allowed.

MACFARLAND

v.

WASHINGTON, ALEXANDRIA AND MOUNT VERNON RAILROAD COMPANY.

APPEALABLE ORDERS; TEMPORARY RESTRAINING ORDERS; MUNICIPAL REGULATIONS.

1. An order overruling a motion to dissolve a temporary restraining order granted *ex parte* and continuing the same, is in effect an order granting a temporary injunction, and is appealable, under section 7 of the act of Congress of February 9, 1893, creating this court; and such an appeal brings up the question of the propriety of the temporary injunction; *following* Electric Lighting Co. v. Met. Club, 6 App. D. C. 536, and Parsons v. Hill, 15 id. 532.
2. The fact that an electrical switch and appliances erected by a railway company without first obtaining the permission of the municipal authorities, as required by law, was installed for use in case of emergency only, and that no danger can result from temporarily enjoining the municipality from removing them, will not justify the continuance of a restraining order enjoining their removal until proof can be taken.
3. Where the Commissioners of the District ordered a railway company to remove an electric switch and appliances, installed by it at the intersection of certain streets without having obtained permission to do so, and the company, in a suit for an injunction, obtained an order temporarily restraining the Commissioners from executing their official order, it was *held*, on an appeal from an order overruling a motion by the Commissioners to dissolve the restraining order, that, as it did not appear that they had exceeded their powers or abused their discretion or acted oppressively in ordering the removal of such construction, that the restraining order should be dissolved.
4. A statute or regulation looking to the public interest and safety will be upheld by the courts unless it is plain that it has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law.

No. 1089. Submitted June 4, 1901. Decided June 18, 1901.

HEARING on an appeal by the Commissioners of the Dis-

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Argument of Counsel.

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trict of Columbia, from an order of the Supreme Court of the District of Columbia overruling a motion to vacate a temporary restraining order and continuing the same until final hearing, and also on a motion by the appellee to dismiss the appeal. *Motion to dismiss overruled and order appealed from reversed.*

The facts are sufficiently stated in the opinion.

Mr. Andrew B. Duvall, Attorney for the District of Columbia, and *Mr. C. A. Brandenburg*, Assistant Attorney, for the appellants.

Mr. J. M. Wilson, *Mr. A. S. Worthington* and *Mr. A. A. Hoehling, jr.* for the appellee.

1. The appeal should be dismissed. This is the ordinary case of a motion by a defendant to dissolve a pending injunction after he has filed his answer. The practice in this regard has long been settled, and will be found discussed in 3d Daniell's Chancery Pleading and Practice (3d American edition), top pages 1786 to 1788, and in 2d Beach's Modern Equity Practice, sections 781 to 786. The order appealed from expressly overrules the motion "to dissolve the restraining order heretofore granted." It is submitted that the fact that the order appealed from also continues the restraining order cannot affect the matter, because the overruling of the motion to dissolve left the prior order in force as a matter of course.

2. The appeal is from a preliminary injunction. We understand this court to hold that in appeals from interlocutory orders, where the court below is called upon to exercise its discretion, this court will not reverse such an order unless the case is a plain one. *The United States Electric Lighting Company v. The Metropolitan Club*, 6 App. D. C. 536.

Mr. Justice SHEPARD delivered the opinion of the Court:

1. This is an appeal from an interlocutory order. On August 25, 1900, the Washington, Alexandria and Mount Vernon Railway Company filed a bill against the District commissioners to enjoin the execution of an official order to complainant to remove an electrical switch and appliances erected by it at the intersection of Maryland avenue and Fourteenth street southwest. On the same day an order was made restraining the defendants, as prayed, until the further order of the court upon hearing to be had on September 12, 1900. The next thing shown in the record is the sworn answer of defendants, filed October 13, 1900, controverting the material allegations of the bill and explaining the grounds of their action. April 1, 1901, the court overruled defendants' motion to vacate and discharge the restraining order and further ordered that the same be continued till the final hearing.

The defendants, treating this as an order for an injunction, took an appeal and perfected the same within the time required by law. The appellee moves to dismiss, on the ground that the appeal is not from an order granting an injunction within the contemplation of the seventh section of the act creating this court and defining its jurisdiction, but is merely from the interlocutory decree refusing the motion to dissolve the restraining order, and hence is not appealable save by special leave of the court.

It is clear that the original order was intended to operate as the ordinary temporary restraining order pending notice of preliminary hearing. Without such hearing and without special order continuing it in force, it seems to have been treated as continuing until further order might be made. The defendants' motion, after answer, brought the question on for hearing whether the order should be dissolved or should remain in force *pendente lite*. Though continued as a restraining order it had all the consequences of an injunction. Being in substance an injunction, it was clearly appealable. *U. S. Elec. L. Co. v. Met. Club*, 6 App. D. C.

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536, 543. And the appeal, though technically from the order overruling the motion to dissolve, brings up the only question involved, namely, the propriety of the temporary injunction. *Parsons v. Hill*, 15 App. D. C. 532, 539. The motion must, therefore, be overruled.

2. Passing now to the merits of the cause, we find no material conflict in the facts alleged in the bill and answer.

The appellee is a corporation of the State of Virginia authorized to construct and operate a passenger railway, operated by electric power, between the Potomac river and Mount Vernon. By act of Congress of August 23, 1894 (28 Stat. 494), the corporation was authorized to lay double tracks on certain streets in the city of Washington, commencing on B street between Seventh and Eighth, northwest, thence westward along B to Thirteen-and-a-half street, thence northward on Thirteen-and-a-half street to E street, by single track, thence westward on E to Fourteenth street, on a single track, thence southward on Fourteenth street, using the tracks of the Belt Line street railway to the Potomac river, thence across the same. This included the necessary switches, turnouts and other mechanical devices, "the number and location of which shall be approved by the commissioners of the District of Columbia." (Sec. 1.)

"All rails, electrical and mechanical appliances, conduits, stations, and so forth, shall be of approved pattern and subject to the approval of the District commissioners." (Sec. 4.)

Overhead wires are prohibited, except for 400 feet at a slip for ferry, etc., at foot of Fourteenth street (Secs. 5 and 1). The power to make all needed trenches and excavations is subject to the condition of, "having first obtained the permission of the commissioners of the District." (Sec. 7.) "The said company shall run street railway cars propelled by underground cable or underground electric power."

* * *

"Provided: That whenever the foregoing route or routes may coincide with the route or routes of any duly incorporated street railway company in the District of Columbia

the tracks shall be used by both companies, which are hereby authorized and empowered to use such tracks in common, upon such fair and equitable terms as may be agreed upon by said companies; and in the event the said companies fail to agree upon equitable terms, either of said companies may apply by petition to the Supreme Court of the District of Columbia, which shall immediately provide for proper notice to and hearing of all parties interested, and shall have power to determine the terms and conditions upon which and the regulations under which the company hereby incorporated shall be entitled so to use and enjoy the track of such other street railway company, and the amount and manner of compensation to be paid therefor." (Sec. 11.)

Section 21 provides: "That all plans relating to the location and construction of said railway shall be subject to the approval of the commissioners of the District of Columbia, or their successors, and all work shall at all times be subject to their supervision." The operation of the new railway began in May, 1896. In Virginia it operated with an electric current of 550 volts from grounded generators with an overhead trolley. This crossed the Long bridge and terminated at the plow pit located at the foot of Fourteenth street.

The District commissioners required it to operate the line in the city from nongrounded generators, and this forced the company to obtain power from the United States Electric Lighting Company, which was working in the District. The volt current to be obtained from that company was one of 250 volts, and the appliances of the cars were adapted thereto. Under an act of Congress of June 24, 1898 (30 Stat. 488), the Anacostia and Potomac River Railroad Company acquired the Belt Line franchise, tracks, etc., and reconstructed the tracks for the underground electric system of propulsion as required by Congress.

This company and appellee being unable to agree upon terms of joint operation and maintenance of the tracks on Fourteenth street, between E street north and B street south, both appealed to the Supreme Court of the District

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for a settlement of the same as provided in section 11 aforesaid of the act of 1894. The commissioners were not parties to the proceeding. April 25, 1900, said court made a decree. It appears that the current of the Anacostia company, which was necessary to be used for the operation of both companies, was of 550 volts. This necessitated changes, on the part of the appellee, in the appliances of its cars, and it was compensated therefor. Said decree contains the following clause upon which the appellee relies: "Said Anacostia and Potomac River Railroad Company shall, at its own cost, put in electrical switches at E street north, and B street north and at B street south, to enable the Washington, Alexandria and Mt. Vernon Railway Company to connect its own source of supply with its own conductor bars for use in case of an accident, or in the event that the said Anacostia and Potomac River Railroad Company shall fail to furnish the current required as aforesaid."

The Anacostia company operated a metallic system with nongrounded generators, the same as the United States Electric Lighting Company, which was the then source of supply of appellee for its city service. Some time early in June, 1900, appellee installed a switch and connections at the intersection of Fourteenth street with Maryland avenue, so as to obtain an operating current from its Virginia power plant. No permission was asked of the commissioners for this installment. Hearing of it, they addressed the following communication to the appellee on June 22, 1900:

"DEAR SIR: The commissioners are officially advised that your company has connected its grounded system with the metallic system within the District of Columbia. Not only was this work done without the approval of the commissioners, as required by the provisions of your charter, but is, in the opinion of the commissioners, both objectionable and unlawful, and I am directed to notify you to remove within ten days from this date all constructions connected with this work.

" Respectfully,

" (Signed)

W. TINDALL, *Secretary.*"

Replying thereto, the appellee disclaimed the intention to do an illegal act, and denied that any damage would occur from said action.

- It also explained the necessity of having a means to procure power in event of accident, etc., to the Anacostia power system at any time. After some correspondence the commissioners, on August 23, 1900, notified appellee to remove its connections within forty-eight hours. Thereupon the bill was filed and the restraining order obtained.

Aside from the fact that the appellee had proceeded with the construction of the connecting appliances without applying to the commissioners for leave, and had thereby violated the law, the commissioners, under oath, set out the reasons that influenced them in ordering the removal of the same, and for which they would have refused permission, as follows:

"They admit that the Anacostia and Potomac River Railroad Company is part of a system of street railroads operating within the District of Columbia lines of railroad traversed by a great number of cars for local passenger traffic, and on the Anacostia and Potomac route aforesaid it operates its cars at intervals of about three minutes, and by means of its various connecting lines and switches it is able, in the event of accident or tie-up, to switch its cars to a connecting line, and that the complainant company is engaged in operating a through line of railroad from the city of Washington to Rosslyn, Alexandria, and Mount Vernon, in the State of Virginia, running its trains at intervals of about thirty minutes, and in the event of accident or failure to supply current on the aforesaid Anacostia route its traffic might be suspended and loss result therefrom, and, in order to guard against such emergency, the provision was inserted in the aforesaid decree requiring the Anacostia and Potomac River Railroad Company to put in certain electrical switches, etc. — that is to say, the complainant company anticipates the possibility of trouble in obtaining current from the Anacostia and Potomac River Railroad Company, and, while this is possible, these defendants, representing the public

and bound to protect the interest and anticipate not only the possibility, but the probability, of trouble, damage, and loss to the electric light and power constructions, conduits, cables, pipes, etc., in the District of Columbia, and they say that the fact that such loss and damage has resulted and will probably result from such constructions, and they further say that the electric light and power companies of the District of Columbia have built up the electric light and power system on the fourteenth and D streets along D street to the north of the building occupied by Engine Company No. 2, and on the fourteenth and fifteenth streets, and on the grounds to Ohio avenue, and thence along the fourteenth street and under the tracks of the railroad company into the building occupied by the engine company, and these defendants propose, within the building, to draw lead-covered cables into these buildings, and to be contained the wires of the fire-alarm and telephone system. Wherever such cables in the District of Columbia are run in the ground by the telephone company, they are bonded to the ground by the telephone company, and are protected by the company, and are protected by the company, and these new conduits, however, no such protection is provided."

It appears, also, from exhibits to the bill, that the commissioners had been observant of the destruction of the underground pipes, and on account of damage attributed to the electric light and power connecting with Brightwood, had proposed to enact a law with ample penalty to prevent any company from furnishing electric light and power system, any portion of which may be connected to any grounded construction, or which is not insulated from the ground.

The reports of two experts employed by the city, and attached to the bill, in which it is said that the electric light and power made in company with the defendants, and that they found no appearance of electrocution.

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jacent water-pipes and so forth, and could see no reason to apprehend danger therefrom, by the use of appellee's connection aforesaid.

Defendant's engineer reported making the tests, and added:

"While these few tests, under circumstances which did not represent every phase of the ordinary working conditions, tend to show that the use of the grounded connection from the Virginia power-house did not materially alter the relations of the pipes and rails, yet I think it would be a bad precedent to establish to allow such connections to be used. The underground trolley system is supposed to be a metallic circuit system operated from nongrounded generators. It will work no great hardship on the Mount Vernon Railway Company or the City and Suburban Railway Company to furnish power to this section of the road from a separate generator in the power station of the United States Electric Lighting Company, past which the railroad tracks run and which formerly supplied power to the road.

"Very respectfully,

"(Signed)

WALTER C. ALLEN,
Electrical Engineer, D. C."

3. It seems entirely unnecessary, at this time, to attempt the interpretation of section 11 of the act of August 23, 1894, and to determine the extent of the jurisdiction conferred thereby upon the Supreme Court of the District, in the matter of making regulations, for the joint operation of the Fourteenth street tracks, between E street north and B street south, and to what extent, also, regulations so decreed would supersede the general powers of regulation and supervision that had been conferred upon the commissioners.

The commissioners have done nothing to impair the operation of that decree. They have not ordered, and do not seek, the removal of the switches and electrical connections for which the decree provides. These are capable of use, in case of the emergency for which they provide, in obtaining the

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power of the United States Electric which, at the time of decree, was the supply. The switch and connections to relates are about two blocks from the p leaves the tracks of the Anacostia comp and could not have been, included in th are attached to the tracks belonging to ated by it exclusively. That they ar it to connect its Virginia grounded s service tracks, in case of need, does r the scope of the decree.

4. Having actually installed the n ances, for use only in case of emerger tends that no immediate danger can, un result from enjoining their removal, a can be taken and the fact of danger with a grounded generator service est cannot concur. The appellee appears asking to be upheld in a plain violati its rights might ultimately be, it was re mit the plan of proposed construction commissioners and ask for approval a There is no excuse for its failure to obe requirement. Its duty was to respect a in case of the denial of a plain right, t for relief. To continue the temporary upon this ground alone, would tend to disobedience of the law.

5. Upon the facts presented, it does commissioners have plainly exceeded th the discretion vested in them, and act quiring the removal of the connection

They are charged by law with the d public health and promoting the safety erty in the District of Columbia, as w sponsibility for the preservation and ca erty. Some of this property, consist and fire-alarm cables of immense cost a

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is peculiarly exposed to injury and destruction by leaking or returning currents of electricity. The nature and conditions of electrolysis, and the means of its prevention and arrest, are not yet fully apprehended. The powers and duties of these executive officers are also, in a measure, legislative and judicial, for they are called upon to exercise judgment and discretion in the enactment and enforcement of rules and regulations in aid of the objects and duties aforesaid.

In addition to the general powers of supervision and control given them in the act conferring upon appellee its franchises in the District, they are granted the express power, by the act approved February 26, 1892, "to make and enforce all such reasonable and usual police regulations, in addition to those already made under the act of January 26, 1887, as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia." 27 Stat. 394. It does not appear that any general regulation of the nature of the subject-matter of this controversy has been made, but the language of the law is quoted in order to illustrate the general nature and extent of the powers conferred upon the commissioners.

A general regulation of constructions of the kind would seem to be impracticable, under all the circumstances to be taken into consideration, and the public safety can, apparently, be more efficiently and justly provided for by the requirement that all such constructions shall first be submitted to the commissioners for consideration and approval, and, if permitted, carried on under their immediate supervision.

In the course of judicial inquiry into the exercise of the powers intrusted to the commissioners, in a particular matter, it must be remembered that they, too, occupy a position of important public trust, as well as presumed impartiality. They are commissioned to stand between the public interests and welfare, on the one hand, and private indifference thereto and individual selfishness, upon the other.

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Whilst what they may deem for the general welfare is not to be promoted by unreasonable regulations that unnecessarily oppress the individual, it does not follow that one is unreasonable and oppressive, in a legal sense, because it may be inconvenient to the individual, as well as burdensome and oppressive, in a particular sense, as regards either his personal liberty or the uses of his property. In case of reasonable doubt whether public injury would follow a particular act, the performance of which is subject to their regulation or supervision, and which appears to be the very case here presented on the facts alleged in the bill and answer, it would seem both expedient and right to resolve the doubt in favor of the public interest.

Hence, it is the well-established rule of the courts, in the execution of their supervisory function, that a statute or regulation looking to the public interest and safety will be upheld save when plain that it has "no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law." *Hennington v. Georgia*, 163 U. S. 299, 303, 304; *B. & O. RR. Co. v. Dist. of Col.*, 10 App. D. C. 111, 128; *Dist. of Col. v. Hazel*, 16 App. D. C. 283, 288.

Looking to the sworn answer of the commissioners in this case, explaining the grounds of their action, with the reinforcement of the advice of the public electrical engineer, we are unable to find that their action in the premises has been in excess of their powers or in abuse of their discretion. As we had occasion to say in a former case: "Where the question is one of practical fact, unsettled by experience and resting in opinion, a court should surely hesitate to set up its judgment in opposition to that of the municipal officers, who, by virtue of their training, observation and experience in the performance of their duties, ought to be well informed and capable of arriving at satisfactory conclusions in such matters." *B. & O. RR. Co. v. Dist. of Col.*, 10 App. D. C. 128.

Our conclusion is, that there was error in refusing to dissolve the restraining order, and in continuing the same in

force pendente lite. For this the decree will be reversed, with costs, and the cause remanded with direction to vacate the restraining order, and take such further proceedings in the cause as may seem proper. *Reversed.*

DAVIS v. THE UNITED STATES.

CRIMINAL LAW; THEFT; INDICTMENT; MONEY, DESCRIPTION OF; CONFESSIONS; JURISDICTION; PRESUMPTIONS; CHARGE TO JURY.

1. An indictment in which a count for theft is joined with a count for embezzlement will not be held defective on appeal where the same evidence was relied upon to establish each and the defendant could not, therefore, have been misled or prejudiced in the preparation of his defense; especially where, at the trial, the count for embezzlement was abandoned by the prosecution.
2. An indictment for the theft of money, under section 1158, R. S. D. C., is sufficient in its description of the stolen money, which describes it as "certain securities and obligations of the said United States, current as money, and being in the national currency and money of the said United States, of the value in the aggregate of one thousand dollars, the respective kinds, descriptions, denominations and values whereof the grand jurors aforesaid have no means of ascertaining and, therefore, cannot give, of the goods, chattels and moneys of"—(naming the owner); and testimony that there were some fifty-dollar bills among the stolen money, the whole consisting of such currency of the United States as a certain grocery company took in over its counter in the transaction of its ordinary business, is sufficient to support the indictment.
3. The portion of the charge of a trial court in a prosecution for theft, relating to the testimony as to an alleged confession by the accused, and the effect to be given to it by the jury, reviewed and held to contain error prejudicial to the accused.
4. *Quære*, whether the courts of this District have jurisdiction of the offense where a theft is committed in a neighboring jurisdiction and the stolen property thereafter brought here.
5. Where, in the prosecution of an express messenger for the theft of a package of money intrusted to him, in Atlanta by his employer, the express company, to be delivered by him in Washington, the

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Government made no attempt to prove anything relating to the actions of the defendant on the train between those places, the only testimony upon the subject being that offered by the accused, and nothing was developed from the evidence to show what opportunities the accused had to leave the train temporarily, or whether he in fact did so, and he was not himself interrogated thereon, it was held to be error prejudicial to the accused for the trial court to charge the jury, first, that they might infer from all the facts and circumstances, including an alleged confession by the accused, that he feloniously took the package somewhere on the way, and, thereafter, that they might "infer from such facts that he brought it with him into the District, in the absence of proof to the contrary," such a charge authorizing a presumption upon a presumption or an inference from an inference alone, and imposing upon the accused the burden of disproving or overcoming the final inference.

No. 1098. Submitted June 5, 1901. Decided June 18, 1901.

HEARING on an appeal by the defendant from a judgment of conviction of theft of the Supreme Court of the District of Columbia, and sentence thereon, upon the verdict of a jury in the trial of an indictment for theft and embezzlement. *Reversed.*

The COURT in its opinion stated the case as follows:

The appellant, George R. Davis, was indicted in the Supreme Court of the District for the theft of \$1,000 from the Southern Express Company, has been tried and convicted, and appeals from the judgment and sentence thereon.

The indictment embraces two counts, the first of which charges the offense of theft, and the second, that of embezzlement, there being an allegation that defendant was an employee of the Southern Express Company and as such charged with the possession and safe-keeping of the property. On the trial, the Government abandoned the embezzlement count.

The defendant moved to quash the indictment and, upon the trial, reserved numerous exceptions to the admission of evidence, as well as to the giving and refusal of instructions to the jury. Motions in arrest and for new trial fol-

lowed the verdict of guilty. The leading facts of the case, shown in the bill of exceptions, are these: On July 3, 1899, the Eufaula Grocery Company, at Eufaula, Alabama, delivered a package of currency, amounting to \$1,000, to the agent of the Southern Express Company, at that place, for transportation and delivery to the Fourth National Bank of New York city. The treasurer of the grocery company was not able to state whether the currency consisted of national bank notes, silver certificates, gold certificates, or United States treasury notes. All that he could say was, that there were some fifty-dollar bills in the package and the whole consisted of "such currency as the grocery company took in over its counter in the transaction of its ordinary business." He knew that there were no gold or silver coins included and could not remember if there was any legal tender currency. The local agent at Eufaula received and counted the money but could not say that it contained any legal tender notes. He sealed the package in the usual manner, directed it properly and shipped it via Montgomery, Alabama. It was there received at 8 P. M. on July 3d, kept in an iron safe until 5 :30 A. M. on July 4th. The Montgomery agent then tied up the package in a bundle containing six or seven other packages and made out the regular way-bills for the same. He then placed the bundle in a cloth pouch and sealed it by running a small wire through eyelet holes at the top, bringing its ends together and fastening them with a soft lead seal which was compressed by use of the regular sealing iron made for the purpose. The messenger, in whose presence this was done, receipted for the bundle, carried it to the express car and locked it in the safe provided for the purpose. Arriving at Atlanta a short time before 12 o'clock, noon, on the same day, he delivered the pouch, with unbroken seal, to the defendant George R. Davis, who receipted for it. Davis was the messenger of the express company, on the express train then about to start, between Atlanta and Washington, D. C. In the car occupied by Davis, the express company had two safes. One was a large, stationary safe with combination and key locks. The messenger carried a key by which he

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completed the opening of the safe after the combination lock had been operated. This combination was not within the knowledge of the messenger. In this safe were placed all through packages of money and all those for certain important points between Atlanta and Washington, as Charlotte and Salisbury, N. C., and Danville and Lynchburgh, Va. At Atlanta, as well as at the places named, it was the duty of a local agent, intrusted with the secret of the combination, to enter the car, loose the combination lock and, after the removal and deposit of packages in due course of business, fasten the same. The messenger could not open the combination lock and was not permitted to close it. A small safe is also kept in the car and called the messenger's portable safe. In this are placed packages for delivery at way stations where the large safe cannot be unlocked. The package arrived at Atlanta, while the safe was open, a few minutes before 12 o'clock, which was the hour of departure for Washington. Another connecting train, from Birmingham, was a little late, and Spears, the Atlanta agent for the purpose, closed the combination. He did not testify that he saw the Montgomery pouch placed in the safe, where it belonged, before he closed the combination lock; and does not appear to have been questioned in regard to this very important fact. He was the only person, apparently, except Davis, who was likely to know whether the package had been properly deposited. The Birmingham train arrived just as the Washington train was pulling out, and the money packages thereon, for carriage to Washington, were delivered to Davis after the large safe had been closed; there was not time to transfer the way-bills.

These additional packages, sixteen in number, were deposited by Davis in the portable safe. The defendant admitted that he received the Montgomery pouch at Atlanta in apparent good order. The train arrived at Washington a little before 7 A. M. on July 5th. A transfer agent of the express company in the regular course of business, immediately boarded the car and threw off the combination of the large safe, and defendant emptied its contents into the porta-

ble safe. This was then locked and carried by wagon to the office at 921 Pennsylvania avenue, and delivered to R. H. Yates, money clerk. Davis accompanied the wagon. Yates testified to receiving the safe about 7 A. M.; that he examined the pouch aforesaid and the seal thereon and discovered nothing wrong about it; that he had the open safe and contents in the room where he was alone for twenty or thirty minutes; that he put everything addressed to New York in a safe which he locked and sealed; that he put the key of this safe in a sealed envelope; that he delivered the safe and the envelope containing its key upon the express car which was due at New York about 4 P. M. the same day. When the safe and envelope were received in New York, the former was found locked and sealed and the envelope had unbroken seals. The agent at New York took out the key, unlocked the safe, took out the Montgomery pouch and emptied the contents upon a shelf. Upon examination, the \$1,000 package was not to be found. Another package containing \$25,000 had been opened at both ends, but no money was missing. After discovering the loss of the \$1,000 package, it was discovered that the seal was not the genuine seal of the express company used at Montgomery. Arthur Baumgarten, a seal-maker, whose place of business was 1005 E street, Washington, and about two blocks distant from the express company's main Washington office, testified that Davis came to his place, on Saturday, June 17, 1899, and ordered a sealing iron with a die containing the words "Sou. Ex. Co. Montgomery"; that he was unknown to him and gave his name as H. B. Smith; that he paid for the seal in advance and gave him a card upon which was written, "H. B. Smith" and "Sou. Ex. Co., Montgomery"; that he made and delivered the sealing iron to defendant on Tuesday, June 20th; that this iron was such an one as could make the impression found upon the lead seal which bound the wires when opened in New York; and the seal as shown him was made by that iron; that he first disclosed the fact to one Leith, a detective, who came to him and made inquiry in August, 1899; that Leith returned with J. B. Hockaday,

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assistant superintendent of the express company, when he told them all that had occurred and gave them the card left by defendant; that on August 16th he was requested to go to the express company's office for the purpose of identifying the man for whom he had made the sealing iron; that he met Leith and Hockaday and soon the defendant came in and took a seat at a table, whereupon he recognized him as the man for whom the iron had been made and to whom he had delivered it; that shortly thereafter witness went into a small room adjoining the superintendent's office with Leith and Hockaday; that Hockaday called defendant and closed the door; that Leith then asked witness if this was the man for whom he had made the seal; that he said "yes," and defendant immediately drew a revolver and began to shoot at witness. Upon cross-examination, the witness could not tell how defendant was dressed upon either occasion, or describe his hat or any other article of clothing, or say whether his hair was long or short; but said he identified him mainly by the peculiarity of his voice, though he could not describe what that peculiarity was. He further said that defendant said he wanted the seal for use by a private express company, but admitted that he was not certain of the intended use. He knew that the express company's office was near by, but that the order did not excite his suspicion. Morris Kaufman, another seal-maker, whose place of business was on Seventh street, testified, that in June, 1899, the defendant asked him to make a die for a sealing iron; that he could not remember what was to be on the die; that he identified the defendant as the person. He could not describe the defendant's dress or appearance other than that he had a short, stubby mustache; nor could he name the particular day of his call. George E. Leith, an employee of the Pinkerton detective association, testified to his efforts along the entire line to discover the criminal; and to interviewing Baumgarten, and obtaining the card described by him; that after defendant's arrest a memorandum-book was found in his room, in which was written the name, H. B. Smith, in the handwriting of defendant;

that he arranged the plan to have Baumgarten identify defendant, and was present. He described the identification and the scene following, as Baumgarten had done, and stated that defendant was immediately arrested and taken to the police station. J. B. Hockaday, the assistant superintendent, testified to the efforts made to detect the perpetrator of the theft, and to the information received from Baumgarten; that on account of the resemblance of the writing of the card to that of defendant, he determined to have him come to the office, and be identified by Baumgarten. His account of this is substantially the same as that of others. This witness then further said, that he went to the prison to see defendant, at his request, about 6 o'clock on the same afternoon; that he was there again not later than 9 o'clock; that, as the bill of exceptions recites, "he gave the defendant to understand that he believed he was guilty of taking the money, and asked him where the money was, and he told him that he had only \$700 of it left, but did not tell him where the money was; that he could not find out that; that he did not state to the defendant that he was his friend, and that he visited him as a friend." On cross-examination, conducted in the absence of the jury, and with the view to test the competency of his evidence of the confession aforesaid, the witness stated that he had been examined as a witness upon the hearing in the police court and that he did not then testify that, "in the course of the conversation I took occasion to let him understand that I believed he was guilty and the proper course for him to pursue was to make a confession, and said to him, 'Davis, what did you do with the money?'" He expressly denied saying that "the proper course for him to pursue was to make a confession." He denied making more than two visits, and saying on the hearing aforesaid that the last was about 11 o'clock at night.

Upon the recall of the jury, the witness was permitted to testify to the confession made to him as herein first stated above, over an objection of the defendant, founded on the relations of superior and subordinate of witness and defendant, the occurrences of the morning at the office of witness,

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and the imprisonment of defendant at the time of the alleged confession. As the admission of this evidence is made the ground of a special exception and assignment of error, the point will be more readily understood, when hereafter discussed, by the addition here of certain rebutting evidence which the bill of exceptions shows was introduced apparently at a later period.

The stenographer and typewriter who took down and wrote out in full the evidence of Hockaday in the police court, recognized the typewritten evidence as that furnished by him, and stated its correctness.

He read therefrom as follows:

"Q. Did he make a confession? A. Not until after he had done the shooting and when I visited him in the jail.

"Q. You visited him? A. He sent for me; requested me to call upon him, which I did. In the course of the conversation I took occasion to let him understand that I believed he was guilty, and the proper course for him to pursue was to make a confession. I said to him, 'Davis, what did you do with the money?' He replied, 'I have only \$700 of it left.'

"Q. Did you go twice? A. Yes; I visited him three times on that day. Twice after Mr. Beall was there.

"Q. How late was the last time you were there? A. About 11 o'clock; no one with me."

The defendant testified in regard to his identification, arrest, and conversations with Hockaday, as follows:

"That on August 16, 1899, he received instructions from some one to report at Mr. Hockaday's office between 9 and 10 o'clock; that he went to his boarding-house in southeast Washington, got his breakfast, and reported, as directed, to Mr. Hockaday; that when he reached the office he saw a man sitting at the far end of the office that he afterwards learned was Mr. Baumgarten, but that he had never seen him before, and did not then know who he was; that he saw Mr. Leith there and Mr. Hockaday, and that after having done some writing, according to the directions of Mr. Hockaday, he observed the three men go into a small hall room in

the south end of the building, and soon afterwards Mr. Hockaday came to the door and called him in, and that he went in, not knowing what they wanted with him; that as he went in Mr. Hockaday closed the door, and that, the three men standing rather near each other and between him and the door, Mr. Leith spoke to him, saying, 'You had a sealing iron made at this man's place,' pointing to Baumgarten, 'on the 17th of June,' and asked Baumgarten if he was the man. Baumgarten nodded his head. Then Mr. Hockaday said, 'Davis, you had as well own up; we have sufficient evidence to know that you are the man that got the money.' Then Leith said, 'I will give you five minutes to fork up the money.' Witness then testified that, being accused of a crime of which he was not guilty and could not have done and did not want to do and was confronted by three men in a little room, he drew his pistol and commenced shooting; that he was immediately arrested and carried to the station; that after being carried to the station he learned that Mr. Hockaday was hurt at him for trying to kill him; that defendant understood that the charge was made that he had attempted to kill Hockaday. Witness testified that he had not attempted to kill Hockaday, and that when he learned Mr. Hockaday was hurt about the matter he sent for him to tell him that he did not intend to kill him; that Mr. Hockaday then told him that he felt a fatherly interest in him; that he was his friend, and that he was willing to do anything for him that he could, and that if witness would *get* up the money that he would see that nothing was done with him; that the matter should not get into the papers, and that his mother and friends should not learn anything about it. Witness stated that he had never been in such a place before; that he was excited, and that in his excitement he remembers that he did say to Mr. Hockaday that he could not raise over \$600 or \$700; that he believed possibly he might raise something like that, but that he never confessed to having taken any money; that he never intended to confess to taking any money; that he had taken no money from the express company or anybody else.

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Statement of the Case.

He says the statement made by Mr. Hockaday that he confessed that he had \$700 of the money left is untrue."

The following is the testimony on behalf of the defendant, that is of any importance in the consideration of the assignments of error. He testified first on his own behalf, saying that when in Washington, prior to July 4th, and up to August 16, 1899, he had roomed at 641 South Carolina avenue, S. E., and three other messengers occupied the same room; that he had a common trunk in the room; that he had no recollection when he had last seen the memorandum-book with H. B. Smith written in it; that he wrote the name therein of H. B. Smith, who is a cousin to whom he has been much attached, and with whom he corresponded; that he often spoke of his cousin to his friends and room-mates here and in Atlanta; that he did not visit Baumgarten or Kaufman, or order the seal or give Baumgarten the card testified to by him; that he had been a messenger of the express company for three or four years; that a few minutes before 12 o'clock, noon, on July 4th, at Atlanta, Ga., he received the Montgomery pouch from Messenger Farrell in good order and with a perfect seal so far as he knew; that he placed it in the combination safe with other valuables, which was subsequently closed by the Atlanta clerk charged with that duty; that the said safe was not opened any more until reaching Charlotte; that it was there opened by the transfer clerk, Connelley, whereupon the defendant took out the packages for delivery there and gave them to Connelley; that he opened his portable safe and took therefrom the sixteen packages (the same that had been received at Atlanta from the Birmingham agent after the close of the combination safe), which, in Connelley's presence, he put in the combination safe; that Connelley was where he could look into the portable safe (which opened with a lid at top); that Connelley did not change his position before he closed the combination lock; that the safe was again opened and closed by the special agents at Salisbury, Danville, and Lynchburg, each of these opening, standing by, and finally closing the same as required; that

the exchange and delivery were made at Washington as testified to by the special clerks there. The testimony of the baggage-master of the train tended to show that express and baggage were carried in one car without a partition — express at one end and baggage at the other; that baggage-master and express messenger both occupied the car en route; that the car had a door at end, through which trainmen entered the car often; that defendant had no opportunity to open the large safe unobserved, and it was not opened, except at the points stated by him, and then by agents who could see everything put in or taken out. Defendant also testified that in June, 1899, he had a long brown mustache, and in this was corroborated by a number of witnesses.

Further testimony was then offered by the defendant as recited in the bill of exceptions:

John M. Connelley, a witness for the defendant, testified that on the 4th of July, 1899, he was transfer clerk for the Southern Express Company, at Charlotte, N. C., and that he remembers the arrival of the train on that evening, about 8 o'clock, and that the defendant was the express messenger on the Southern road going from Atlanta to Washington; that he went aboard the express car on the arrival of the train and opened the combination safe and transferred to the defendant what express matter he had going north and received from the defendant what was for Charlotte; that he was present and saw everything that came out of the combination safe and everything that went in the combination safe on that occasion; that he saw the defendant take a number of packages out of his portable safe and place them in the combination safe; that from the position which he occupied he could see in the said portable safe, and that he saw the bottom of the safe and saw Davis take everything out of it, and that there was no bag or pouch in that safe, and that while the portable safe remained open witness closed the door of the combination safe and turned the combination on, thereby locking the safe. Further testimony of the witness tended to establish that the reputation of the defendant for honesty and integrity was good.

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Argument of Counsel.

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The defendant introduced in his behalf all the transfer clerks and baggage-masters who were on the train on which the alleged lost package was brought from Atlanta to Washington, and the testimony of each and every one tended to show that the combination safe on said express car at that time was in good condition, and that the defendant had no opportunities of getting into that safe from the time he left Atlanta, Ga., until after he had reached Washington, except as it would be opened at each transfer station by the transfer clerks.

Witnesses, including Hockaday, testified to the good character and reputation of the defendant, and the Government expressly admitted the same to be true. There was no evidence tending to show how often or long the train stopped between Atlanta and Washington, or whether the defendant left the car, temporarily, at any point, or had an opportunity to do so. The record is silent as to when, where and how he obtained meals on the trip, if any. A genuine impression of the Montgomery seal and that taken from the pouch at New York were exhibited. There were some patent differences between the impressions. The Montgomery seal had the date impressed on the reverse; there was no date on the spurious seal.

[The further material facts will be found stated in the opinion.—REPORTER.]

Mr. Fred Beall for the appellant:

1. The indictment in this case seemingly is based upon section 41 of chapter XVI, found on page 164 of the compiled statutes of the District of Columbia. It was, however, contended in the court below, and may be contended here, that the indictment is based upon section 40 of the crimes act. The indictment charges the larceny of "certain securities and obligations of the said United States, current as money and being in the national currency and money of the said United States of the value in the aggregate of one thousand dollars."

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Section 41 declares "If any person shall steal * * * any bank bill, promissory note or notes, bill of exchange, order, receipt, warrant, draft, check, or bond, given for the payment of money, or receipt acknowledging the receipt of money or other property, or any Government bonds, or *other securities* or stamps, *United States Treasury notes*, or any public stocks of the value of thirty-five dollars or upward, *knowing the same to be such*, any such person shall be deemed guilty of a misdemeanor, and on conviction shall be sentenced to suffer imprisonment and labor not more than three years, nor less than one year."

The language of the indictment points directly to that section. If, however, it is founded on that section it is defective in that it fails to state that the securities alleged to have been taken by the appellant were by him known "to be such." The mere taking of the securities, not "knowing the same to be such" under that section, would be no crime. *Evans v. United States*, 153 U. S. 584.

2. The sufficiency of the indictment was attacked by the appellant, both in his motion to quash and in his motion in arrest of judgment, for the reason that the particular place where the alleged crime was committed is not stated in the indictment. It will be noted that the indictment alleges that the offense was committed "at the District aforesaid," referring to the caption of the indictment. It is insisted that the allegation of place is insufficient under the law as declared by the United States Supreme Court, in *Ledbetter v. United States*, 170 U. S. 606.

3. If the first count in the indictment is based on section 40 of the crimes act, the offense charged in that count is a felony. But the second count in the indictment under the law is only a misdemeanor, and the two crimes charged are separate and distinct offenses, and could not be joined together in the same indictment. 2 Bishop's New Crim. L., Sec. 327, and subd. 2, and notes, and Sec. 328. The same act cannot be both a felony and a misdemeanor. 1 Bishop's New Crim. L. 787 and 804, and note; 1 Crim. Proc., Secs. 424, 445, 446. Since an indictment cannot join a count on

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it is ambiguous and vague and deceptive, and is not such an allegation as the appellant should have ever been required to plead to. The proof was that no one knew of what these securities and obligations consisted, whether of national bank notes, silver certificates, gold certificates, or any other obligations. The court seemingly held that, under this indictment, proof showing any kind of obligations or securities of the United States supported the allegation in the indictment. This is error. If such is the meaning of the language of the indictment, then certainly the appellant was not informed of the nature and cause of the crime charged against him. That an indictment charging larceny of money means legal-tender money (such in the United States as gold and silver or United States Treasury notes) is so elementary that it would seem to be unnecessary to cite authorities in support of that proposition. National currency means the same as money. *Wharton v. Morris*, 1 Dallas, 124; *Block v. Ward*, 27 Mich. 191; *Block v. State*, 44 Tex. 620; *Lewis v. State*, 28 Tex. App. 140; 2 Bish. New Crim. Law, Sec. 357; Bish. Stat. Crimes, Secs. 217 and 346; *Wharton's Crim. Pldg. & Pr.*, Sec. 190; *Wharton's Crim. Ev.* 1160; *Wilburn v. Greer*, 6 Ark. 255; *Ballard v. Wall*, 2 La. Ann. 404; *Hamilton v. State*, 60 Ind. 193; *Pryor v. Com.*, 2 Dana (Ky.), 298; *McAuley v. State*, 7 Yerg. 526. It is alleged in the indictment that the grand jury had no means of knowing, and, therefore, could not give, the denominations or value of the bills alleged to have been stolen. The proof shows that some of the bills were of the denomination of \$50, and this was the testimony of the secretary of the company that shipped the package. This was a fatal variance. It was not a fact that the grand jury did not have the means of finding out and giving the denominations and values of at least \$500 in value of the bills shipped by the consignors, for the secretary of the Eufaula Grocery Company testified that he knew some of the bills were \$50. The want of description of the stolen property is only excused as a matter of necessity. In this case there was no necessity, as shown by the proof. This was fatal. *Reg. v. Stroud*, 2 Moody,

270; 1 Bishop's Crim. Proc., Secs. 4 there cited.

5. There was no proof whatever that to have been taken, or any part thereof into the District of Columbia. It is for the sake of argument that the defendant took it to have been stolen, but there isn't a word as to where it was taken, or where it was taken. The presumption is that it was taken in Georgia, and that before it could be taken into the District of Columbia it would have to pass through the several jurisdictions. Maybe he never could find out where the package was taken, below told the jury: "If you find that he got on a through express car when he received the package *if there is no evidence that he was off the car at Atlanta and Washington*; and if you further find that he obtained possession of said package, and that he obtained possession of said package feloniously, while on such car, from such facts that he brought it with him into the District of Columbia *in the absence of proof to the contrary*, the court shall give the following single solitary approved authority in support of that instruction. In the first place, the burden of proof upon the defendant. If the facts and circumstances could be permitted to draw an inference, the court in that instruction declares that an inference should have been based upon the absence of testimony. It is not authorized in any view of the case such an inference be placed upon the Government to show that the package was taken from the pouch upon a through car running between Atlanta and Washington, and that he did not get off of the car until he received the pouch until he reached Washington. In this case at bar the court authorizes the instruction to be based upon an inference, itself based upon the facts, and that "in the absence of proof to the contrary we have that which has always been

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namely, a presumption upon a presumption, an inference from an inference. All the authorities say that venue is a part of the crime, and all declare that it must be affirmatively proven. That is, it must be proven just like any other element of the crime is proven. *Moore v. State*, 55 Miss. 423; *Briggs v. State*, 20 Tex. App. 106; 12 Am. & Eng. Encyc. of Law, 821, and note. It is said by the Supreme Court of the United States in *Brewer's Case*, 139 U. S. 278, that, before a man can be punished, his case must be plainly and unmistakably within the statute.

6. It is not a crime against the United States to bring stolen property into the District of Columbia. If the defendant committed the crime charged against him in the State of Georgia, the offense was against the laws of that State, and he was subject to indictment and punishment according to the laws of Georgia; and if he can be punished when he brings the property into this District upon the fiction that it is a continuing asportation, then he is liable to be punished twice under an entirely different system of laws — to suffer two different punishments — for one and the same act. If the citations found in Bishop and other elementary writers to the effect that it is a crime to bring into one jurisdiction property stolen in another are pursued, and the State decisions examined, in most instances they will be found to rest upon express statutes. There is no statute in the District of Columbia, and I invite the attention of the court to the well-considered case of *State v. Le Blanch*, 31 N. J. Law (2 Vroom, 82). See also *Lee v. State*, 64 Ga. 203; *Beal v. State*, 15 Ind. 378, and the cases cited in *State v. Le Blanch*.

7. It was admitted by the Government that the defendant was a man of good character for honesty and integrity, and the proof was conclusive upon this point. At the request of the appellant the court gave this instruction: "The court instructs the jury that if they find from the evidence that the defendant has proven that he was a man of good reputation for honesty and integrity before the alleged commission of the offense as charged in the indictment in this case, they are authorized to take that fact into consideration, and to

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Argument of Counsel.

give it such weight as they believe it entitled to in connection with all the other facts and circumstances proven in the case." But the court was not content with that familiar and usual statement of the law upon the question of good character, and, therefore, he proceeded to give this instruction to the jury: "Now, on the subject of good character, I will give you *this additional instruction*: 'The good character of the accused is *only* a circumstance to be considered by the jury in connection with all the evidence in the case in determining the question of guilt or innocence. However *good the defendant's character may be, that alone will not entitle him to an acquittal*. The jury can only acquit when a due consideration of all the testimony in the case, including that in regard to the defendant's character, either convinces them that the defendant is innocent, or raises in their minds a reasonable doubt of his guilt.'"

It will be noted that the court gave this instruction in addition to the one already given, and if in addition, certainly it was then in the mind of the court that it declared some other and further principle than that declared in the one given at the request of the appellant. What is it that is additional? It is this: "However good the defendant's character may be, that alone will not entitle him to an acquittal." That is, in the teeth of the law as declared by the Supreme Court of the United States, and of almost every State in the Union and elsewhere where the common law prevails. In the first place, that instruction is erroneous because of the fact that it is upon the weight of the evidence. It was an invasion of the peculiar province of the jury. They alone had authority to say what weight should be given to good character. The court had no authority to tell the jury what weight they should attach to the good character of the appellant, which was conceded upon the part of the Government, and abundantly proven. The weight of authority in this country is that good character is to be given that weight which the jury feel that it is entitled to, and they are authorized, if the fact of good character is sufficient to generate a doubt in the minds of the jury as to the guilt

or innocence of the defendant, to base their verdict wholly and solely upon the fact that the accused is a man of good character. 5 Am. & Eng. Encyc. of Law, p. 867, and authorities there cited. See also *United States v. Gunnell*, 5 Mackey, 196. In the notes to the 5 Am. & Eng. Encyc. of Law are found references to *United States v. Jackson*, 29 Fed. Rep. 503, and *United States v. Jones*, 31 Fed. Rep. 718, and *United States v. Means*, 42 Fed. Rep. 599, and *United States v. Newton*, 52 Fed. Rep. 275. The note to each of these decisions is misleading. The decisions in each one of those cases declare the rule as I have stated it above, and practically as stated in 5 Mackey, 196. I may also refer to the cases of *Hannly v. Com.*, 116 Pa. St. 322; *Com. v. Leonard*, 140 Mass. 473; *White v. United States*, 164 U. S. 100.

8. The court instructed the jury upon the question of confessions by reading from the case of *Hardy v. United States*, 3 Ct. App. 48. But see *Bram v. United States*, 168 U. S. 532, where the doctrine of *Hardy's Case*, upon the subject of confessions, is completely exploded.

Mr. Ashley M. Gould, United States Attorney, for the District of Columbia, for the United States, filed no brief.

Mr. Justice SHEPARD delivered the opinion of the Court:

1. Certain of the errors assigned upon the exceptions taken to the action of the court in overruling the motion to quash the indictment may be dismissed with brief mention. Similar objections to an indictment, because the record did not sufficiently show that the court had jurisdiction of the offense, or the proper return of the indictment by a qualified grand jury, and because of want of particularity of the charge in respect of place and the description of the defendant, and so forth, have been fully considered in a recent case and held to be without merit. *Lanckton v. United States*, ante, p. 348.

2. There is no necessary inconsistency between the two counts of the indictment, as claimed in the motion to quash,

The same evidence, without addition, is sufficient to establish each. The defence is not prejudiced in the preparation of its case.

The motions to quash, and in ar
rightly overruled. *Pointer v. United*
400.

The indictment is founded on section 100 of the Criminal Code which reads as follows:

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The first count, under which the conviction was had, charges the theft of "certain securities and obligations of the said United States, current as money and being in the national currency and money of the said United States, of the value in the aggregate of one thousand dollars, the respective kinds, descriptions, denominations, and values whereof the grand jurors aforesaid have no means of ascertaining and therefore cannot give, of the goods, chattels and moneys of the Southern Express Company," etc., etc.

(1) The description is not only broad enough to cover what is, technically speaking, the money of the United States, but also their obligations to pay in the shape of gold and silver certificates and national bank notes, which operate as the circulating medium of exchange and perform the ordinary functions of money. As all of this paper, issued by, or under the guaranty of the United States, is everywhere received as the full equivalent of legal-tender money, instances would be rare in which the parties holding or transmitting the same, especially in cases like the present, would be able to describe it with greater certainty than was done in the testimony of the transmitter in this case. He could not state whether the bills delivered to the express company consisted of national bank notes, silver or gold certificates, or treasury notes; but "knew it was such currency of the United States as the Eufaula Grocery Company took in over its counter in the transaction of its ordinary business." The allegation was sufficient to inform the accused fully of the character of proof that would be offered against him, and it is not possible that he could have sustained the slightest injury. To require greater particularity of description by the grand jury, in cases like this, would ordinarily work a failure of justice for which no reasonable excuse can be found.

(2) It is not necessary to determine whether the variance between the proof and the allegation would be fatal if the latter had been confined merely to the "money of the United States," and there is no occasion, therefore, to follow the discussion involving the "legal-tender cases," and the meaning of other statutes relating to money, some of them penal, or reviewing the decisions of State courts.

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As we have said before, the description of the indictment is as broad as the statute which applies to all kinds of government securities and obligations which are paid and received as money in the daily transactions of the people. These obligations, technically divisible into gold and silver certificates and national bank notes, as well as the legal-tender treasury notes, constitute what is universally known and understood as "the national currency and money of the United States."

Giving the words of description this popular signification, there was no material variance between allegation and proof; and the court was right in overruling all the objections founded thereon. See 12 Am. & Eng. Encyc. Law, p. 809, and cases cited.

4. The pressure of other important matters as we near the end of the term, and the fact that the judgment must be reversed upon other grounds, prevent the extended statement and consideration of the errors assigned upon exceptions taken to the charge in respect of the evidence of the defendant's good character. It is sufficient to say, that the effect of such proof varies with the facts of particular cases. In some cases it is of no apparent importance, whilst in others it may become a very potent circumstance.

It would be difficult, therefore, if not impracticable, to formulate a charge in respect thereto, applicable to all cases; but one that would seem to answer the purposes of the majority of cases, has been approved by the Supreme Court of the United States in the case of *White v. United States*, 164 U. S. 100, 104.

In our opinion, in this, as well as in the matter of instruction upon the operation of the reasonable doubt, the average jury is less apt to be enlightened by refinements in the charge than by a plain and concise statement.

5. The next assignment of error is founded on the admission of the statement of Hockaday of the confession of the defendant, and this, for convenience, will be considered in connection with that founded on the exception taken to the part of the charge commenting thereon. This evidence has

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been given in the statement of facts heretofore made. The confession, as given by Hockaday, was admissible because it does not appear therefrom that the defendant was improperly induced to make the same. *Bram v. United States*, 168 U. S. 532, 539. Had he admitted, what the report of his former testimony showed, that he had also said to the defendant, "the proper course for him to pursue was to make a confession," the competency of his evidence would admit of some doubt under the doctrine enounced in the case cited above. As he denied making the statement, the question whether he did or not was one for the jury to pass upon under an appropriate charge. The charge referring to the confession was a lengthy one and cannot fairly be condensed with justice to either party. It is reported as follows:

"There is some testimony here of a confession, or admission which amounts practically to a confession, so that I will give you the instruction relative to confessions, so as to enable you to put such weight on that as the circumstances of the case and the words used, if you find they were used, entitle them to have. In that connection, I want to read an extract from the opinion of the Court of Appeals of the District of Columbia in the case of *Hardy v. United States*, 3 App. D. C. 35:

"Confessions are not to be excluded because not spontaneous. They would rarely, if ever, be made without the operation of some influence upon the mind of the prisoner. A mere hope, produced chiefly by the prisoner's own imagination or by his conception of the necessities of his situation, or a fear produced by the fact that he has been charged with a serious crime, for the first time in his life, perhaps, arrested and lodged in a close cell, are not sufficient to require the exclusion of confessions made under their several influences. It is only where the confession may be said to have been extorted — that is to say, dragged reluctantly from the breast of the prisoner through the deliberate excitation of his hopes or fears by some actual promise or threat — that the court should refuse to let it go to the jury for any purpose. In all other cases it should be given to the jury as was done

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in this instance, with the instruction that it was their duty to reject it altogether if they should have a reasonable doubt as to its voluntary nature.'

"Confessions, of course, are of various kinds. If the defendant, on arraignment here, on having this indictment read to him in open court, should plead guilty, that is all he need to say. That would be a judicial confession that would dispense with the necessity of trial at all — a formal judicial confession of guilt. But if he makes a statement outside of court that amounts to such a confession as that, and it is made voluntarily, without any inducement or any threat or fear held out to him, no matter even if made to some officer having him in charge or made to a disinterested party, it would be competent evidence to be produced before you, and in this case evidence of that character has been introduced.

"A free and voluntary confession is evidence of the highest character, but if made by reason of fear, duress, threat, promise, or hope induced upon the mind of the accused or made by a third person, it is not to be admitted, and, if admitted, the jury are to determine what force it may have where the nature of the force or influence that was exercised does not appear until the testimony is before the jury. If such influence has been brought to bear on the mind of the defendant as to overcome his will and make the confession unworthy of credit, it should not be believed or considered; and if promises or threats were used, if they had no influence, or their influence was totally done away with before the confession was made, the evidence should then be considered.

"The main question in regard to confessions is the same as it is in any other kind of testimony. The main question is, was the confession made under such circumstances that it may be considered true? Is it worthy of belief as a statement of facts? If you believe that the defendant told Hockaday that he had only \$700 of the money which was in the \$1,000 missing package, you may, if you believe such admission to be the truth, presume from that statement that he had feloniously taken the missing package; and if you fur-

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ther believe that he had brought such money, or \$35 or more of it, into the District, your verdict should be guilty."

In our opinion, the foregoing charge contains error that was prejudicial to the defendant. It is just to say that the error of the learned justice was, in great measure evidently, superinduced by expressions in the opinion, delivered by the present writer for this court, in *Hardy v. United States*, 3 App. D. C. 35, 48, some of which were read to the jury as part of the charge.

The decision in that case, in the absence of one in point by the Supreme Court of the United States, was in accord with what we conceived to be the doctrine of the majority of well-considered English and American cases where there had been no legislation affecting the rule. Since then, the Supreme Court has considered the general question, and, after an exhaustive review of the authorities, given expression to views, which, though the facts of the two cases are quite different, conflict with the expressions in the opinion in the *Hardy Case* that form a part of the charge. *Bram v. United States*, 168 U. S. 532 542, 549, 550, 555, 560, 565. Some passages of the charge, however, are hardly supported by the decision in *Hardy's Case*, and are directly in conflict with that in *Bram's*. Some of these are the following: "If such influence has been brought to bear on the mind of the defendant as to overcome his will and make the confession unworthy of belief it should not be believed or considered:" "The main question in regard to confessions is the same as it is in any other kind of testimony. The main question is, was the confession made under such circumstances that it may be considered true? Is it worthy of belief as a statement of facts?" In *Bram's Case* it was said: "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" 168 U. S. 542.

The court should have instructed the jury to consider the

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relations of superior and subordinate employee, of the same corporation, that had existed between the witness and the defendant for several years; the conduct of the witness in attempting to force a confession on the morning of the same day; the incarceration of the defendant in jail upon the additional charge of assault with intent to murder; the number and purposes of the visits of witness to the jail and his conversations with the defendant, in determining whether the statement of the defendant was voluntary. The jury should also have been directed to consider whether they would accept the witness' later statement of the conversation with the prisoner, as the true version, or that recorded by the stenographer as made immediately after the occurrence; and further, that any doubt in their minds whether the confession was voluntary must be determined in favor of the accused.

6. The remaining errors that have been assigned and pressed on the argument may also be considered together.

The defendant asked several instructions to the effect: That to convict as charged, the jury must believe the property was feloniously taken in the District of Columbia; that if so taken in either Georgia, South Carolina, North Carolina, or Virginia, by breaking the seal of the pouch and abstracting the package, the offense was then and there completed, and they must acquit the defendant. These were all refused and exceptions were duly reserved. In the course of the general charge, the court, after telling the jury that if they believed Hockaday's statement of the confession, they might presume the felonious taking of the package, and find the defendant guilty if they further believed he had brought the same, or \$35 or more of it, into the District, proceeded as follows:

"If you find that the defendant was on the through express car when he received the pouch, and if there is no evidence that he was off the car between Atlanta and Washington; and if you further find from all the evidence, alleged admissions, and circumstances that he in some way obtained possession of such pouch, opened it and took out the pack-

age feloniously while on said run, you may infer from such facts that he brought it with him to this District in the absence of proof to the contrary."

To this an exception was also reserved.

(1) The first contention hereunder is that the courts of the District of Columbia have no jurisdiction over the offense of theft committed in a neighboring State, because the stolen property shall have been thereafter brought into said District.

This presents an interesting and important question of law that has been much debated and has resulted in a decided conflict of opinion. A similar contention was expressly denied, at an early day, by the Circuit Court of the District. *United States v. Tolson*, 1 Cr. C. C. 269; *United States v. Mason*, 2 idem, 410.

The same doctrine has been applied in Maryland (*Worthington v. State*, 58 Md. 403, 409), and, it seems, in a majority of the States. The principle is in the application of the legal fiction that the theft is repeated in any county or State in which any asportation of the property occurs. All the decisions, English and American, concur where the question is one of venue as between different counties of the same State. Some of the States—New Jersey, New York, North Carolina, Pennsylvania, Tennessee, and perhaps Kentucky—have refused an extension of the fiction where the original taking was in another State, holding, in such case, that the thief, in bringing the property into another State, becomes nothing more than a fugitive from justice, and liable to arrest and return as such. On the other hand, Maine and Vermont go to the extreme of punishing the theft where the removed goods have been stolen in Canada. Massachusetts, again, takes jurisdiction where the theft has occurred in another State, but has denied it when occurring in Canada. *Com. v. Uprichard*, 3 Gray, 434.

We will not now undertake the determination of this vexed question.

This is not an ordinary case of theft, where the felonious taking is necessarily complete in one act. This package was

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intrusted to the defendant for safe carriage to, and delivery within, the District of Columbia. It must be remembered that there was no direct proof that defendant took the money, or if he took it, where the act was done. He was not seen with the package upon his person; no demand was made en route; it was not missed and hence no search was made for it. The mere intent to take the money, no matter when or where conceived, could only become an offense, in contemplation of law, when followed by the actual taking and change of the character of his possession.

If it had been proved that the defendant actually removed the package from the sealed pouch, in one of the States traversed, and took the same into his personal possession with the intent to convert the property to his own use, and so brought it into the District, the original taking would constitute a complete offense, and the jurisdiction to punish him here would then depend upon the latter act and the question, whether, in law, that would be regarded as repeating the felonious taking. It is because of this apparent inability to prove the actual taking, if there was such by the accused, at any particular place between Atlanta and Washington, that we regard the determination of the particular point as not now essential. Besides the cause is one that ought to be speedily decided, and the few days left before the adjournment of the term do not afford sufficient time for its necessary examination and careful consideration.

(2) We are of the opinion, however, that the charge given by the court, as quoted above, embodies error.

The Government made no attempt to prove anything relating to the actions of the defendant between leaving Atlanta and arriving at the station in Washington. The defendant called the only witnesses thereto. These included the railway baggage-master, who occupied the same car, and the express company's transfer agents at the four points where the combination safe had been opened. No questions were asked by either side, tending to develop what opportunities the defendant may have had to leave the train temporarily, or whether he in fact did so; nor was the defendant himself

interrogated thereon. Under these conditions, to first charge the jury that they might infer from all the facts and circumstances, including defendant's confession, that he feloniously took the package somewhere on the way, and, thereafter, that they might "infer from such facts that he brought it with him into the District, in the absence of proof to the contrary," was clearly erroneous. It authorized presumption upon presumption, inference from inference alone. "A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption." *United States v. Ross*, 92 U. S. 281, 284; *Weaver v. Railroad Co.*, 3 App. D. C. 436, 455.

The error was rendered more serious by the addition of the words: "in the absence of proof to the contrary". This imposed the burden of disproving or overcoming the final inference upon the defendant. To enable the jury to infer that the package, after having been stolen, had been brought into the District, it was incumbent upon the prosecution to offer additional evidence, from which the inference could be made, with the necessary certainty, that it must have been.

Any evidence, on the part of the defendant, tending to show that he had opportunities to secrete or deposit the package for safe-keeping, in any of the places through which he passed after having received it, would necessarily have tended to strengthen the circumstances from which the original felonious taking was to be inferred.

It follows that the judgment must be reversed and the cause remanded, with direction to grant a new trial.

Reversed.

Mr. Chief Justice ALVEY dissented.

THE ECKINGTON AND SOLDI
WAY COMPAN

v.

McDEVITT.

CONTRACTS; MEASURE OF DAMAGES;

1. Where the owner of a tract of land grants a right of way through her land sixty feet thereby cutting the tract into two parts, and gives her promissory note for \$500 to the company which the company agrees to construct and maintain the right of way and to run its cars there day and night, and the company, after operating it for a time in accordance with the contract, abandons it and refuses further to operate it, the measure of damages recoverable by the owner of the tract, is the actual loss she has sustained by the contract, to be determined by the ascertainment of the value of the tract with the railroad upon it and in the same land with the railroad abandoned.
2. In the absence of actual sales of the property, it is proper to ascertain such value from the estimates of persons conversant therewith.

No. 1079. Submitted June 6, 1901. Decided July 1, 1901.

HEARING on an appeal by the defendant from the verdict of the Supreme Court of the District of Columbia upon the verdict of a jury in an action for breach of a contract concerning the occupation of it. *Affirmed.*

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The COURT in its opinion stated the case as follows:

This is a suit at common law wherein the appellee, Florence McDevitt, recovered damages in the Supreme Court of the District for the breach of a contract which had been entered into between herself and the appellant, The Eckington and Soldiers' Home Railway Company.

The appellee owned and resided upon a tract of land, comprising upwards of twenty acres, situated on the east side of Lincoln avenue, in this District, about three-quarters of a mile northward of the northeastern boundary of the city of Washington, but within the lines of the proposed extension of certain streets of the city. The appellant, a city and suburban railway company organized under acts of Congress of the United States for this District, owned and operated a street railroad, constructed along Third street northeast as far as T street northeast, or rather such T street as extended or proposed to be extended, and which from the point of intersection of these two streets was constructed and operated eastward along the line of T street, away from the land of the appellee. It was desired by the railway company to extend its road to the northwestward over the land of the appellee so as to reach the gates of three cemeteries which bordered upon Lincoln avenue; and accordingly, on April 4, 1889, an agreement was made between the appellant and the appellee, whereby the appellee contracted to convey to the appellant, and its successors and assigns forever, a right of way sixty feet in width through her land following the line of the proposed extension of Second street east and V street north to the east line of Lincoln avenue, and to execute and deliver to the appellant her promissory note for the sum of \$500, payable, with interest, on or before five years thereafter; and the appellant on its part contracted, as the condition of the grant, that it would complete the extension of its tracks on the lines indicated on or before October 1, 1889; that it would establish certain grades on the lines of street within the appellee's land which it was to occupy, and that after the extension should be completed

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and opened for traffic it should run a car thereon to Lincoln avenue at least once in thirty minutes between the hours of 7:30 A. M. and 6 P. M., and at least once an hour thereafter to 9 P. M., and one car at 11 P. M.

This contract was executed under seal by the appellee and her husband, of whom the latter has since deceased; and it was executed by the railway company by its president, but without any seal.

The appellee in due time executed and delivered to the appellant the deed of conveyance provided for in the contract and the promissory note for \$500 stipulated to be made. The deed, which bore date on December 27, 1889, contained the covenant for the running of cars which was agreed on in the contract to be done by the railway company.

The railway company on its part constructed the branch road so proposed to be constructed over the right of way so conveyed, and continued to maintain and operate the same until the early part of the year 1893, when it ceased to run any car on this branch road after 6 o'clock P. M. Thereupon, on June 26, 1893, the appellee filed a bill in equity to enforce specific performance of the contract of April 4, 1889, so that the cars should be run at the specified hours. The appellee filed an answer to the bill, wherein it admitted the execution of the contract and the grant of the right of way in pursuance of it, but sought to excuse its failure to carry out its part of the contract by the running of cars on the ground that this branch road was unprofitable. It alleged also, apparently as matter of defense, that the appellee's land was cut into two parts by the extension of the road, and was for that reason rendered less valuable for subdivision into building lots. It objected also, that the appellant's obligation under the contract was such a continuing one as could not well be the object of specific performance in equity, and that there was ample remedy for the complainant at law.

On July 9, 1894, this bill of complaint was dismissed without prejudice to the right of the complainant to resort to such remedy at law as she might be advised.

In June or July of 1893, almost immediately after the in-

stitution of the suit in equity which has been mentioned, the appellant wholly ceased to run any cars on this branch line; and soon after the dismissal of the suit the attorney of the appellant notified the attorney of the appellee that the company would not perform the contract. The appellant was then notified by the appellee to remove its tracks from her land, and that she would bring suit for damages. Accordingly, on August 8, 1894, the present suit was instituted.

The declaration contained two counts, the first of which was founded upon the express contract of April 4, 1889, and the second of which also was founded upon express contract, but not stated to be in writing. Both alleged performance of the contract by the plaintiff, here the appellee, and the breach of it by the defendant company by its failure to run its cars as stipulated. The defendant company pleaded to the declaration as a whole that it had not promised as alleged; that the value of the plaintiff's land had not been diminished, and that the plaintiff had evicted the defendant and thereby prevented the running of the cars and extinguished the right of action. To these pleas there were replications filed, and finally joinders of issue; and the cause went to trial.

At the trial the execution of the contract of April 4, 1889, full compliance with it by the plaintiff, except as to payment of the promissory note for \$500, and breach of the contract by the defendant, were fully and conclusively proved and were not sought to be controverted on behalf of the defendant. Various objections were interposed by the defendant to the introduction of testimony, all of them without merit, and all of them covered by repeated and long-established adjudications which it would serve no good purpose to cite. Among the objections were that the contract of April 4, 1889, did not bear the corporate seal of the company, and that there was no proof of any charter provisions authorizing the construction by the company of the tracks in question. To the introduction in evidence of the proceedings in equity, to which reference has been made, and which were introduced as evidence of admissions on the part of the rail-

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road company, objection was made on the ground that the bill had been dismissed without prejudice. A paper was offered in evidence on the part of the plaintiff showing a subdivision of the land in accordance with which she had sold lots in it, and of which sales she stated the several prices paid; and to this paper objection was made because it was not recorded among the land records of the District.

The only real question in the case for determination by the jury was that of the amount of damages to be awarded for the conceded breach of the contract. In elucidation of this question witnesses were introduced who had purchased some lots of the land from the plaintiff, and the testimony was also introduced of persons acquainted with the value of this and adjacent property. This testimony was directed to show the difference between the value of the property, with the railroad in operation according to the contract between the appellant and the appellee and the value thereof after the operation of the railroad had ceased. Similar testimony was introduced on behalf of the defendant to show that part at least of the alleged depreciation was due to the financial panic of 1893, and the consequent stagnation in the matter of the sale of real estate for several years thereafter.

Instructions on the measure of damages were requested on behalf of the plaintiff, which were given. Nine special instructions on behalf of the defendant, which were refused by the court, were to the effect that the plaintiff was not entitled to recover at all, or at most only nominal damages.

The jury returned a verdict for the plaintiff in the sum of \$15,000.

Motions for a new trial and in arrest of judgment were made on behalf of the defendant. The former it is not for us to consider. The motion in arrest of judgment was based on the ground that the two counts of the declaration stated different causes of action, and that the verdict being general did not indicate upon which count it was based; and also that it did not appear that the promissory note for \$500 hereinbefore mentioned had ever been paid, or that tender of payment had ever been made. At the same time application

was made on behalf of the plaintiff for amendment of the verdict so as to show that it was based upon the first count of the declaration; and the second count was withdrawn. The plaintiff's application was allowed; the second count of the declaration was withdrawn; the verdict was amended so that it should purport to be based on the first count; and the defendant's motions for a new trial and in arrest of judgment were denied.

Thereupon judgment was rendered in favor of the plaintiff for the amount of the verdict, the sum of \$15,000; and from this judgment the defendant has appealed.

Mr. W. D. Davidge, Mr. John Ridout and Mr. W. D. Davidge, jr. for the appellant:

1. Damages recoverable on a breach of contract are measured by the *actual loss* sustained, provided such loss is what would naturally result as *the ordinary consequence of the breach* or as a consequence which may, under the circumstances, be presumed to have been in the contemplation of *both parties* as the probable result of a breach. *Hadley v. Baxendale*, 9 Exch. 341; *Horne v. Midland Rwy. Co.*, L. R. 8 C. P. 131.

This plain and intelligible rule has been expressly approved by the Supreme Court of the United States in *Howard v. Stillwell & Bierce Co.*, 139 U. S. 199, 207, 208; and by this court in *Gurley v. McLennan*, 17 App. D. C. 170, as founded in justice and the presumed intention of parties and has been, it is believed, universally adopted by the courts of this country. It will be observed that by the rule damages are restricted to actual loss sustained, and even then still further restricted to such loss as would naturally result as the ordinary consequence of the breach or as under the special circumstances may be presumed to have been in the contemplation of both parties to the contract as the probable result of the breach. The latter part of the rule, that allowing the enhancement of damages because presumably within the contemplation of both parties, has been qualified by the case of *Horne v. Midland Rwy. Co.*, *supra*, in

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Argument of Counsel.

which case it was held that the enhanced damages must have entered into the contract, and that mere notice of the purpose of making the contract would not have the effect of enhancing damages beyond such as would arise naturally or according to the usual order of things. This is now the English law and the decision has been followed in some of the States. *Harvey v. Conn. RR. Co.*, 124 Mass. 421; *Ward v. Central RR. Co.*, 47 N. Y. 29; *Ward's, etc., Co. v. Elkins*, 34 Mich. 439; *Mather v. American Express Co.*, 138 Mass. 55. But so far as known has never been passed upon by the Supreme Court of the United State. It is unnecessary to discuss it here for the reason that there is in the present case no evidence tending in any degree to show the purpose or intention of the plaintiff or her husband in making the contract, nor that whatever such purpose or intention, the defendant had any knowledge or reason to know or believe or suspect the same. Had the proper rule of damages been given, it is manifest that instead of the extravagant verdict of \$15,000 against the defendant, there must have been a very different result. There was no actual loss sustained by the plaintiff as required by the rule. All the plaintiff says is that since the breach of the contract she has not had any "offers" for her land. It is not pretended that there was any existing contract of sale of any part of the land, of which she was deprived by the breach, nor that she made any attempt to sell, nor, indeed, that she was even willing to sell; but the inference to be drawn from the evidence is that, on account of the depression of prices, she held on for better times, like hundreds of others. Hence there could be no recovery, any loss being dependent upon the future, and wholly speculative and contingent. If she continues to hold at the present time, she can sustain no loss. The precise point of the effect of the absence of actual loss was before the Supreme Court of the United States in the case of *The Western Union Telegraph Co. v. Hall*, 124 U. S. 444. See also *Hetzel v. Railroad*, 6 Mackey, 1.

2. Instead of adhering to the rule universally recognized and which was designed to afford adequate protection to a

party charged with breach of contract whilst giving compensation to the other party, the court below utterly disregarded all the predicates of liability required by the rule and instructed the jury as he might have done had these predicates been established. In other words he virtually assumed liability under the rule to exist, and instructed the jury as to the method of computing damages on such assumption. Now, it is submitted that actual loss and, if any, whether it was the probable and natural consequence of the breach, or was contemplated by both parties to the contract, and whether the diminution in the market value of the land was owing in any and to what degree, to the breach, or was attributable to other causes, were all matters that constituted the predicate of liability, and yet in the instruction of the court there is not the remotest allusion to them. The jury were instructed to find for the plaintiff without regard to the conditions of liability and hence it may be said without liability on the part of the defendant. But apart from this, the ruling as to the measure of damages is, taken by itself, radically defective. There is nothing in the evidence to justify a departure from the established rule and the substitution in such a case of a new rule based upon the assumed difference in market value. Indeed, there was no evidence of market value with or without the cars running, in the proper signification of the term "market value." There had been no public sale and there was no market value in any legal sense. All the transactions were private and special, and the opinions given in evidence were based upon such transactions and not upon "prices established by public sales in the way of ordinary business." Of which, so far as appears, there never had been a single instance. 14 Am. & Eng. Ency. of Law, 467-469.

If there were no other objection to the instruction as to the measure of damages than its failure to restrict the amount of the verdict to the difference in market value *caused by the breach of contract and not* the result of other circumstances, that would be sufficient to dispose of it here and to entitle the defendant to a new trial.

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3. It was error to admit testimony of the witnesses Moore and McLeran as to their opinions concerning the value of the land with a railroad and without it. This was purely speculative and conjectural, lacking as it did any specification of the elements which entered into the formation of the opinion of the witnesses. The only effect of such testimony could be to mislead the jury and it should have been excluded. *Roberts v. N. Y. Elevated RR. Co.*, 128 N. Y. 499.

4. The president of a railway company has no inherent power to bind the company by any agreement except in the ordinary discharge of the company's business. He certainly has no such authority in respect of the construction of an extension of the railway. *Titus v. Cairo RR.*, 37 N. J. Law, 98; *Templin v. Chicago Rwy.*, 73 Iowa, 548. It is obvious that the answer in the equity suit signed only as it was by the then vice-president, was not sufficient in itself to establish the execution of an agreement by authority of the corporation, and the agreement and record in the equity suit should not have been admitted in evidence.

Mr. A. S. Worthington, Mr. John C. Heald, and Mr. Charles L. Frailey for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

The appellant has here assigned the somewhat unusual number of thirty-nine assignments of error, of which only one has been seriously insisted on before us; and that one we regard as well settled by the authorities. It concerns the question of the measure of damages in a case like the present.

That the appellee was entitled to recover damages in this case, is too plain for argument. We do not understand it to be controverted. The execution of the contract, its performance by the plaintiff, and the breach of it by the defendant, were conclusively proved; and that something more than merely nominal damages should be awarded, we must regard as beyond reasonable question. What should be the

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measure of the damages to be recovered? In the light of reason and of the numerous authorities upon the subject, we cannot regard this as a question of very great difficulty.

The contract is one concerning land, and the use and occupation of it. The owner of the land, the plaintiff in the cause, in consideration of the benefit which she presumed her concession would bring to her in the use and disposition of the remainder of it, granted to the railroad company, the other party to the contract, and the defendant in the cause, a right of way over and through the land sixty feet wide and three feet deep, thereby cutting the land into two parts; and at the same time she executed and delivered to the railroad company her promissory note for \$500. That she expected the land of which she retained the use to be enhanced in value by this concession, must, of course, be assumed; for such contracts are not entered into in the ordinary course of things for mere benevolence. For the same consideration of prospective benefit to itself, the railroad company assumed to construct and operate a railroad over the right of way so given, and to run its cars thereon at certain specific hours of the day and night. The plaintiff fully performed the contract on her part, and as to her it is wholly executed and nothing remains to be done. The defendant's side of the contract is in part executory. It constructed the road and for a time operated it in accordance with the agreement; and then it wholly abandoned it and refused further to operate the road or to run its cars thereon. And then it attempted to escape liability on the ground that the plaintiff had suffered no actual loss, since her land had been restored to her and she now has it, notwithstanding that a trench sixty feet wide and three feet deep has been dug through it, which, according to the defendant's solemn averment under oath, has rendered it less valuable for the only purpose for which enhancement in value was sought by both parties to the contract—its subdivision into city lots. Such is the case which we have before us.

The damages for which the plaintiff is entitled to recover is the actual loss which she has suffered by reason of the

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abandonment of the railroad and the cessation of its operation by the defendant. That actual loss is only to be determined by the ascertainment of the value of the land to its owner with the railroad upon it and in operation, and the value of the same land with the railroad abandoned and ceased to be operated. This is what the trial court told the jury in the instruction which it gave on behalf of the plaintiff; and the instruction was undoubtedly correct. *Dawson v. Pittsburg*, 159 Pa. St. 317; *Mewes v. Crescent Pipe Line*, 170 Pa. St. 364; *Railroad Co. v. Knapp*, 51 Tex. 592; *Ferguson v. Stafford*, 33 Ind. 162; *Topeka v. Martineau*, 42 Kans. 387; *Dwight v. Commissioners*, 11 Cush. 201; *Pike v. Chicago*, 155 Ill. 656; *Railroad Co. v. Kerth*, 130 Ind. 314; *Railroad Co. v. De Lissa*, 103 Mo. 125; *Baltimore v. Brick Co.*, 80 Md. 458; *Benjamin v. Hillard*, 23 How. 149; *Shepherd v. B. & O. RR. Co.*, 130 U. S. 426.

In the absence of [evidence of] actual sales of the property, which would not always be practicable or possible, and which, therefore, it would be absurd to require as a criterion of value, it is right and proper to ascertain such value by the opinions and estimates of persons conversant therewith, notwithstanding that such opinions and estimates are in their nature to a certain extent speculative. Were the rule otherwise, no values could be established at all in the absence of actual sales. This is the well-established doctrine of the law conclusively settled for us by the Supreme Court of the United States in the case of *Montana Rwy. Co. v. Warren*, 137 U. S. 348, where it is said by Mr. Justice Brewer, speaking for the court, that, in respect to the value of real estate, "the opinions of witnesses familiar with the territory and its surroundings are competent;" and also, that "at best, evidence of value is largely a matter of opinion, especially as to real estate." See also *Blair v. Charleston*, 43 W. Va. 62; *Diedrich v. Railroad Co.*, 47 Wis. 662; *Curtin v. Railroad Co.*, 155 Pa. St. 20; *Tucker v. Railroad Co.*, 118 Mass. 546; *Chandler v. Jamaica Pond Aqueduct*, 125 Mass. 544; *Hunter v. Railroad Co.*, 84 Iowa, 605; *Railroad Co. v. Union Stock Yards*, 120 Mo. 541; *Lee v.*

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Springfield Water Co., 176 Pa. St. 223, and the cases hereinbefore cited.

As stated in the case of *Dedrich v. Northwestern RR. Co.*, 47 Wis. 662, "evidence of this kind is admitted from necessity." It is the fault of the defendant, trespasser or wrongdoer that the necessity has supervened.

The principal part of the argument on behalf of the appellant is devoted to the elucidation and supposed application to this case of the rule laid down by the English Court of Exchequer in the case of *Hadley v. Baxendale*, 9 Exch. 341, as qualified by the subsequent decision of the Court of Common Pleas in the case of *Horne v. Midland Railway Co.*, L. R. 8 C. P. 131, which rule is thus stated:

"Damages recoverable on a breach of contract are measured by the actual loss sustained, provided such loss is what would naturally result as the ordinary consequence of the breach, or as a consequence which may under the circumstances be presumed to have been in the contemplation of both parties as the probable result of such a breach."

This rule was approved by the Supreme Court of the United States in the case of *Benjamin v. Hillard*, 23 How. 149, 167, and again in the case of *Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 206; and the principle of it was applied in several intervening cases. We had occasion to apply the same rule in this court in the case of *Gurley v. MacLennan*, 17 App. D. C. 170.

But there is no antagonism between this rule and that applied by the court below in the present case. The purpose of the rule in the case of *Hadley v. Baxendale* was to exclude consideration of remote, uncertain, and speculative profits as elements in the estimate of damages; and it is believed that in our country the courts are unanimous, or almost so, in the exclusion of such elements of damages from the consideration of the jury. But that rule ends where the rule in the present case begins. That rule requires that only actual loss sustained, which is the natural result as the ordinary consequence of the breach, should be recovered in a suit for breach of contract. The rule laid

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down in the present case assumes that, when an improvement exists on land by the convention of parties, such as the railroad in the case and its operation were undoubtedly presumed to be, and that improvement is removed in violation of the convention, the consequent depreciation in the value of the land, if such depreciation is shown, is the natural result and the ordinary consequence of the wrongful removal of the improvement; and the amount of such depreciation is the measure of damage. Plainly there is no antagonism between these two rules. Nor does there any antagonism arise on the ground stated in the second branch of the rule in the case of *Hadley v. Baxendale*, that the damage for which recovery is to be had must be such as under the circumstances may be presumed to have been in the contemplation of both parties as the probable result of such breach. It is not often that parties stipulate expressly with reference to the damages that might result from their violation of their own contracts, and they did not so stipulate in the case before us. But when they contemplate advantages, as here they undoubtedly did, as the result of the performance of their contract, they must in reason be held to have contemplated the corresponding disadvantages as the result of the violation of such contract, whether the question of such possible violation actually entered into their thoughts or not. Every man must be presumed to have contemplated and intended the natural and ordinary consequence of his own wrongful act; and there is no more natural result of the wrongful removal of an improvement from land than depreciation in the value of such land.

The *New York Elevated Railroad Cases* — *Roberts v. Railway Co.*, 128 N. Y. 455; *Doyle v. Railway Co.*, 128 N. Y. 488, and *Gray v. Railway Co.*, 128 N. Y. 499 — are also cited as establishing a different doctrine from that held by the trial court in the instructions granted to the jury in the present case. But a careful reading of those cases will show that they are not subject to any such construction. The contention there was to show by expert witnesses what the value of abutting real estate, assumed to have been in-

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jured by the construction of the elevated railways, would be if the nuisance of such construction were removed. This the Court of Appeals of the State of New York held could not be allowed, inasmuch as it contemplated a condition of things which might never exist and which, therefore, was wholly speculative. Had the contention been as to the present value of the property with the alleged nuisance existing and the past value of it before the nuisance was placed there, a very different question would have been presented. And Mr. Justice Peckham, now of the Supreme Court of the United States, and who was then a member of the Court of Appeals of New York, and wrote the opinion in the *Roberts Case*, is careful to make the distinction. For he says: "I refer to this not for the purpose of throwing any doubt upon the admissibility of expert evidence upon the question of the past or present value of real estate, where the witness is shown to be competent to give an opinion thereon. This was decided years ago by this court, and has been continuously approved since that time. See *Clark v. Baird*, 9 N. Y. 183."

This, we think, disposes of the principal contention in the present case; and the other questions sought to be raised by the numerous assignments of error do not seem to us to require serious consideration. They are elementary questions which must be regarded as having been settled long ago. Among them is the question presented by the appellant's motion in arrest of judgment in the court below, to the effect that the declaration contained two counts stating different causes of action, and the verdict being general did not indicate upon which count it was based, and, therefore, could not stand. Notwithstanding that the plaintiff in the court below sought to obviate this question by withdrawing the second count of the declaration or suffering a nonsuit upon it, the question is again raised in this court by the last of the appellant's thirty-nine assignments of error. But its consideration by us is unnecessary, since upon the argument before us it was expressly abandoned by the appellant.

We are of opinion that there was no error in the rulings

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of the trial court in the premises, and that the judgment of that court should be *affirmed, with costs. And it is so ordered.*

A writ of error to the Supreme Court of the United States was prayed by the appellant and allowed June 25, 1901.

PALMER v. AUGENSTEIN.

MEASURE OF DAMAGES.

In an action against the marshal for an unlawful seizure of goods under a writ subsequently quashed, in the absence of circumstances of oppression or willfulness, it is error for the trial court to permit the plaintiff to introduce evidence as to what the goods, bought by him to be sold at auction, would have realized at auction at the time of the seizure, and to instruct the jury that in ascertaining the damages they might take into consideration the amount the goods would have realized at auction if sold by the plaintiff in his usual course of business at the time of the seizure; the measure of damages being the market value of the goods at the time and place of seizure, less their market value at the time of their return.

No. 1080. Submitted June 7, 1901. Decided June 18, 1901.

HEARING on an appeal, by the defendant, from a judgment of the Supreme Court of the District of Columbia entered upon the verdict of a jury in an action to recover damages for the alleged unlawful seizure and detention by the defendant, the United States marshal for the District of Columbia, of a stock of goods. *Reversed.*

The facts are sufficiently stated in the opinion.

Mr. J. A. Maedel and *Mr. John Ridout* for the appellant.

Mr. Leon Tobriner for the appellee.

Mr. Justice SHERARD delivered the opinion of the Court:

This is an appeal from a judgment for damages in the sum of \$1,250 for the seizure and detention of a stock of goods, and the single question for determination arises on the admission of certain evidence, and the charge of the court respecting the measure of damages.

Plaintiff, Samuel W. Augenstein, was engaged in the business of buying stocks of goods and reselling them at auction at two places of business, one of which was on Pennsylvania avenue. October 23, 1899, he bought a stock of men's and women's furnishings, and so forth, of one Lesser for the sum of \$1,250. These goods were removed to the avenue storehouse, arranged and advertised for sale at auction along with some other goods therein worth about \$400.

October 30th the goods were seized by the marshal under a writ issued out of the Supreme Court of the District in a proceeding in bankruptcy that had been begun against said Lesser. The plaintiff refused to point out the goods obtained from Lesser, and the marshal selected the same as far as able for levy and returned them as appraised at \$1,034.68. The goods were not removed from the house because plaintiff requested that they remain under care of watchmen. Meanwhile he suspended his daily auction sales.

On November 9, 1899, the court quashed the writ and directed the marshal to return the goods to the plaintiff, which was immediately done. The goods were afterwards sold at auction in lots, by the plaintiff, with about \$400 or \$500 of other goods, and the gross sum realized was \$1,684. Witnesses for the plaintiff testified that the Lesser stock was worth from \$3,000 to \$4,000 at the time of the seizure, and that it was greatly depreciated in value by the treatment received. Over the objection of the defendant, some of the witnesses were permitted to testify that the goods at the time of seizure would, in their opinion, have realized from \$2,500 to \$3,000 if they had been sold by plaintiff at auction as intended.

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Opinion of the Court.

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The following instruction was then given to the jury on the prayer of the plaintiff:

"If the jury find from the evidence that the plaintiff is entitled to recover, in ascertaining his damages they may take into consideration the difference in value between what the property seized by the marshal was worth at the time [of] such seizure and what it was worth after being returned to the plaintiff in so far as any depreciation of such property resulted from such seizure and detention of the same by the defendant, and in ascertaining such values they are at liberty to consider the evidence relating to the original cost of such property, the amount paid therefor by the plaintiff, the amount that it would have realized at auction if sold by the plaintiff in his usual course of business at the time it was seized by the defendant, and the amount that it did finally realize when sold as detailed in the evidence."

The defendant agreed that this instruction would be correct, if the consideration of the possible proceeds of sale at auction were excluded therefrom; and took an exception to the inclusion of the words, "*the amount that it would have realized at auction if sold by the plaintiff in his usual course of business at the time it was seized by the defendant.*"

In our opinion, both of the objections of the defendant were well taken. There were no circumstances of oppression or willfulness in the case. The damages claimed were such only as resulted from the ordinary execution of the process and the detention of the goods until their restoration was ordered upon the vacation of the writ. The measure of damages was, therefore, the diminution of the value of the goods by reason of their seizure and detention, together with interest thereon. *The Amiable Nancy*, 3 Wheat. 546, 560; *Bates v. Clark*, 95 U. S. 204, 209, 210.

In other words, it was the market value of the goods at the time and place of seizure, less their market value at the time of their return. 3 Sutherland Dam. 592; 1 Sedgwick Meas. Dam. Sec. 244; 2 Idem, Secs. 494 and 565.

This value at time of seizure was not determinable alone by the price paid by plaintiff for the goods. That was merely

one element of proof of value. The real value was what the goods were reasonably worth in the market at the time and in the condition that they were. If the plaintiff had obtained them for less than their reasonable market value he was entitled to the advantage of his purchase. But their value to him could not be ascertained by evidence of what, in the opinion of witnesses, he might have sold the goods for at auction if the contemplated sales had not been interrupted. No matter with what confidence witnesses may have spoken, their evidence amounted to nothing more than conjecture. To permit such evidence, in a case like this where there is no pretense of malice or oppression, is to introduce into the estimation of actual damages a material element of speculation and uncertainty that has been generally excluded in analogous actions of tort or for breach of contract. See *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 652; *Stillwell v. Bierce Mfg. Co.*, 139 U. S. 199; *W. & G. RR. Co. v. American Car Co.*, 5 App. D. C. 524, 543; *Gurley v. MacLennan*, 17 App. D. C. 170; *Fererro v. W. U. Tel. Co.*, 9 App. D. C. 455, 475, 477.

That plaintiff had purchased the goods for sale at auction, furnishes no reasonable ground for taking his case out of the application of the ordinary rule for the measure of damages, in cases of wrongful levy upon goods of the same kind in the possession of the ordinary merchant or trader. The business of buying goods for sale at auction, after the manner of plaintiff, is exceptional, and what they may sell for from day to day, in matter both of quantity and price, can be nothing more than guess-work.

For the reasons given, the judgment will be reversed with costs, and the cause remanded with direction to grant a new trial.

Reversed.

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LONE WOLF

No. 96. Original docket. Submitted

HEARING on an application
ance of a special appeal from
of the District of Columbia
injunction in a suit in equity
of the Kiowa, Comanche and
respondents, Ethan Allen J
terior, William A. Jones, C
and Binger Hermann, Com
Office, from opening to settle
lands claimed by the petition

Mr. William M. Springer

Mr. William Van Deventer
the United States, opposed.

Per CURIAM:

This application for the a
the order of the court below
injunction or restraining or
bill, has been very fully arg
parties, and we have duly
conclusion to which we hav
that the case is not such
prayed, but the case should
from which an appeal may
from the decree of this cou
Supreme Court of the Un

obtaining a preliminary injunction is to prevent immediate action by the executive department, but we suppose that such reasonable delay may be obtained as will enable the complainants to avail themselves of the right of appeal from a final decree that may be passed in the case. In refusing this appeal we intimate no opinion as to the final decree that may be made by the court below. *United States Elect. Lighting Co. v. Ross*, 9 App. D. C. 558. *Application refused.*

THE ALFRED RICHARDS BRICK COMPANY

v.

ROTHWELL.

No. 1081.

ROSS v. SAME.

No. 1082.

WEST v. SAME.

No. 1083.

GARTHE v. SAME.

No. 1084.

CONTRACTS; SURETYSHIP; BONDS; EQUITY; GOVERNMENT CONTRACTORS;
LIENS; PRIORITIES; FOLLOWING TRUST FUNDS; SUBROGATION; EQUI-
TABLE ASSIGNMENTS; APPELLATE PRACTICE.

1. Sureties on bonds given by government contractors as required by the act of Congress of August 13, 1894 (28 Stat. 278), providing that every such contractor before commencing work shall give a

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Syllabus.

bond conditioned upon the payment of all persons supplying material and labor in the prosecution of the work, have a right in equity to interpose to prevent the diversion or misapplication of the contract price and to require it to be paid out to such materialmen and laborers in the first instance by virtue of the lien and preference given by operation of the statute; and this right of the sureties cannot be displaced or derogated from by any action on the part of the contractors looking to the protection of their general creditors.

2. A provision in a contract between a contractor and the District of Columbia, providing for the payment by the contractor of all claims for work and material and for the retention by the District commissioners, in their discretion, of a sufficient sum of money from the contract price to pay such claims, does not constitute the municipal corporation a trustee for materialmen and workmen, or give the latter any enforceable lien or preference over other creditors in the distribution of any portion of the contract price remaining in the hands of the commissioners.
3. Where receivers of insolvent government contractors assume and carry out contracts of such contractors for the building of school-houses for the municipal government and life-saving stations for the Federal government, and in so doing use funds derived from the schoolhouse contracts in the completion of the life-saving stations, persons supplying material and work in the erection of the schoolhouses are not entitled to follow such funds or to have preference over the claims of persons furnishing work and material in the erection of the life-saving stations.
4. It is only in cases where a person advancing money to pay the debt of another stands in the situation of a surety or is compelled to pay it to protect his own rights, that equity will substitute him in the place of the creditor as matter of course without any agreement to that effect; but in other cases the demand of a creditor which is paid with the money of a third person and without agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguishable.
5. Where insolvent government contractors give a power of attorney to one of their creditors to perform their contracts and receive and disburse moneys received thereunder to their creditors, and such power of attorney contains no provision for the compensation of such attorney, and the affairs of the contractors are subsequently placed in the hands of receivers, of whom such attorney is one, he has no lien or preference for compensation for his services performed while acting as such attorney, in the subsequent distribution among creditors, but if entitled to compensation at all, is entitled to it only as a general creditor of the contractor.
6. Where government contractors induce a third person to indorse their

Statement of the Case.

[18 App.

note in order to procure money to complete one of their several contracts under a promise to pay the note out of the money to be derived from such contract, the transaction will not constitute an equitable assignment so as to entitle the indorser to priority over other creditors of the contractors in a distribution by receivers of funds received by them upon the completion of all the contracts.

7. An appeal to this court will not be dismissed upon the ground that the appeal bond was approved by one of the justices of the lower court without notice having been first given to the appellee to show cause against the approval; rule X of this court not requiring that such a notice be given as a prerequisite to the approval of the bond by the lower court.

Submitted June 7, 1901. Decided October 8, 1901.

HEARING on several separate appeals taken from a decree of the Supreme Court of the District of Columbia, ratifying and confirming a report of the auditor of that court, distributing certain funds in regard to which there were conflicting claims for priority of allowance. *Reversed.*

The COURT in its opinion stated the case as follows:

The record before us presents four appeals, numbered, respectively, 1081, 1082, 1083, and 1084, as they stand upon the calendar of this court. These appeals are taken from the decree or final order of the court below, on February 1, 1901, ratifying and confirming the auditor's report and accounts filed in the cause October 19, 1900. The appeals are by separate claimants in respect to the action of the court below in affirming the auditor's report distributing the funds in controversy, in regard to which there are conflicting claims for priority of allowance.

The record presents considerable complication, if not confusion, in the proceedings. The original bill was filed by sureties in contractor's bond to secure the proper application of the fund arising under the contract to the discharge of claims for work and materials furnished in the construction of the buildings. An injunction and receivers were asked for. To this bill a cross-bill was filed by one of the firm of contractors, praying a dissolution of partnership and settlement of partnership affairs, and also asking for an

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Statement of the Case.

injunction and receivers. In this state of proceeding another surety of the same contractor, on a bond for the execution of a different contract, made application to intervene, and, upon obtaining leave, filed a bill, and prayed for similar relief to that prayed for in the original bill, and also prayed for an injunction and for receivers. Receivers were appointed, and they took charge of the funds that accrued under the several contracts that the contractors had entered into prior to filing the original bill.

The parties to the proceedings are very numerous, and as the questions presented by the appeals are questions of the right of priority of payment from the different funds brought into the case for distribution, the rights and relation of the parties to the funds and to each other will best appear by a clear statement of the allegations made in the several bills, and the contents of certain documents filed therewith. We shall, therefore, state with some fulness the allegations of the bills and answers, and the contents of the exhibits.

By the original bill, filed by Rothwell and Linger as sureties, Thomas R. Riley, Frank Baldwin, William C. Peake, and many other persons were made defendants. In that bill it was alleged that on June 15, 1897, the firm of Baldwin & Peake entered into a contract with the United States government for the construction of three life-saving stations, namely, at Dam Neck Mills, False Cape, and Caffey's Inlet, on the coast of North Carolina and Virginia, for the sum of \$14,613, and simultaneously with the contract gave bond in the penalty of \$15,000, with the complainants, Rothwell and Linger, as sureties therein, conditioned for the performance of the work according to the contract, and with the further condition that the contractors, Baldwin & Peake, would promptly make "payment to all persons supplying them with labor and materials in the prosecution of the work provided for in such contract." It is further alleged that the buildings were finally completed in the month of March, 1899, and that there was due on account thereof by the United States the sum of \$8,088, but that there were outstanding and unpaid sundry claims against the contractors, and com-

plaintiffs as sureties, for labor performed and materials furnished in and about the construction of said life-saving stations.

It is then alleged, that, for certain reasons stated, Baldwin & Peake, the contractors, on August 25, 1898, executed and delivered to Thomas R. Riley, one of the defendants, an instrument, in the form of a power of attorney, whereby they sought to appoint said Riley as their attorney to complete said life-saving stations, and to perform certain other contracts of said firm therein mentioned, and to authorize him to collect the money due or thereafter to become due on any of said contracts, and to apply the same "to the completion of said several contracts and to the liquidation of any indebtedness of the said firm" then existing or thereafter incurred in and about the execution of said contracts. This instrument or power of attorney contains this clause: After reciting the fact that the firm of Baldwin & Peake had entered into contracts with the United States government to build four life-saving stations, and which remained uncompleted; and also entered into contracts with the commissioners of the District of Columbia for the erection of three schoolhouses in the said District, and which said contracts with the District remained only partly performed—the instrument then proceeds to recite, "that whereas certain differences have arisen between the said Baldwin and the said Peake in regard to the management of the business of the firm, now, in order to obviate possible litigation between the said partners over said differences, and to facilitate the completion and execution of the contracts referred to, the said parties hereto of the first and second part have, and do hereby appoint Thomas R. Riley their true and lawful attorney to complete and carry out the several contracts above named, and for that purpose empower the said Riley to do all things that may be necessary and requisite, *in the name and behalf of the said firm*, to fully execute said contracts. And further, to collect any and all sums of money that may be now payable or that may become hereafter payable, from the United States government or from the District of Co-

D. C.]

Statement of the Case.

lumbia, by reason of, or on account of, the said contracts; and from the said moneys so received, to pay any and all just indebtedness due and incurred in and about the execution of said contracts. It being distinctly understood that any money received on account of any of the said contracts referred to, *in the discretion* of the said Thomas R. Riley, shall be applied to the completion of the said several contracts and to the liquidation of any indebtedness of the said firm now existing or hereafter incurred in and about the execution of the said contracts, as the said Riley, in his best discretion, shall find to be to the best interests of all concerned. And further, that any money remaining in the hands of the said Riley, after completing all of the contracts herein referred to, and liquidation of all just debts connected therewith, shall be held by the said Riley to be paid to the said Baldwin & Peake, respectively, as their interests may be hereafter agreed upon or may be otherwise settled," etc.

This instrument was signed by Baldwin and Peake separately and individually, with separate seals; but it was not signed by Riley.

After referring to the instrument just quoted, the bill further alleges that it was the purpose and intent of the parties to such instrument that Riley should first pay out of any fund which he should receive from any particular work, the debts and obligations incurred in and about the construction thereof, before making distribution of any portion of the fund among the general creditors of the firm of Baldwin & Peake. That Riley, acting under said power of attorney, took charge of the prosecution of said work, and received from time to time large sums of money on account thereof. That the complainants were not parties to said agreement, were not consulted in relation thereto, and did not assent to the same; and, further, that the persons who furnished labor and materials for the completion of the said life-saving stations had no information of the existence of the said power of attorney.

The complainants then aver that in equity they were entitled to have first paid out of the fund resulting from the

completion of the life-saving stations all claims for labor and materials actually furnished, and performed in their construction and completion, for which the complainants were legally liable under their bond before any portion of the fund should be paid to the general creditors of Baldwin & Peake. And further, that the defendant Riley, in violation of the purposes and intent of the power of attorney, and contrary to its terms, was seeking to obtain from the treasury of the United States the balance due on said life-saving stations, with the avowed purpose of diverting the same from the payment of claims for labor and materials arising under the contract for the construction of the life-saving stations, and of applying the same towards the payment of the claims of certain creditors, among whom was Riley himself, accrued under other contracts. The bill upon these allegations prayed for an injunction, the appointment of receivers, the application of the fund to the payment of the claims for labor and materials furnished in the construction of the life-saving stations, and for general relief.

Upon this bill temporary receivers were appointed, and they made a report to the court as to the *status* and extent of the fund owing by the United States to the contractors.

In the answer of Riley, Lincoln, and Ross, defendants, to the rule to show cause against the appointment of receivers and the issuing of an injunction, reference was made to a meeting of creditors of the firm of Baldwin & Peake shortly after the making of the power of attorney referred to, and to an agreement that was made at that meeting, which was made an exhibit in the cause, and in which it is recited that the firm of Baldwin & Peake were contractors for the erection of three schoolhouses in the District of Columbia, and four life-saving stations on the coast of North Carolina; that said firm had been using indiscriminately the money received on account of some buildings upon the work of all, and being embarrassed, appointed the said Riley *their agent* to receive all moneys due or to become due on account of any of said buildings, and to employ so much thereof as was necessary to complete those which were still uncompleted,

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Statement of the Case.

and distribute the residue among the creditors of the firm who contributed labor and materials to complete the buildings or any of them, and to pay over the surplus to Baldwin & Peake; and the agreement also recites that the provisions contained in the power of attorney to Riley *met with the approval of the creditors who signed the latter agreement*. All of the appellants now before the court (except appellant Garthe), were among those who signed the agreement, and thereby consented to the arrangement devised. By this agreement, the creditors signing the same, agreed to withdraw notices of claims theretofore filed by them with the commissioners of the District of Columbia against the firm of Baldwin & Peake, and consented that the District of Columbia and the United States should make payment of the money due on said contracts to said Riley, regardless of said notices, and they agreed not to file any further notices of claims thereafter.

At this meeting of the Washington creditors who signed the agreement just referred to, and who had claims against Baldwin & Peake for labor and materials furnished in the construction of the schoolhouses, for the purpose manifestly of securing to themselves any surplus or balance that might remain of the funds becoming due from the United States, after satisfying and discharging all claims for labor and materials furnished in the erection of the life-saving stations, they appointed S. D. Lincoln and Samuel Ross to act as a committee in conjunction with Riley to superintend the completion of the several works for which Baldwin & Peake had contracted, and to collect and disburse the money becoming due under the several contracts, in accordance with the terms and arrangement agreed to by them. In the joint answer of Riley, Lincoln, and Ross, the committee, to the original bill, in answering the allegation that the complainants did not sign the agreement, and, not being parties thereto, they were not bound thereby, these defendants say, "they admit that the complainants were not parties to the execution of the power of attorney and the agreement between the creditors, and they were not consulted in connection

therewith, and they aver that it was not necessary that the complainants should either execute or be consulted about the execution of those instruments." The answer then proceeds to say: "These defendants say they are willing that all just claims for labor and materials actually furnished to said Baldwin & Peake in connection with the construction of the three life-saving stations should be paid, and they now tender themselves as ready and willing to pay all such just claims." They further allege and contend that the complainants have no concern with the disbursement of the fund received by Riley *after* all claims for labor and materials furnished in the construction of the three life-saving stations were paid. They further admit that the power of attorney to Riley could only operate to constitute the latter the mere agent of Baldwin & Peake for the purposes therein stated.

After this answer had been filed, Peake, one of the firm of Baldwin & Peake, and one of the defendants to the original bill, filed a cross-bill against Riley, Ross, and Lincoln, the committee representing the creditors who had signed the agreement to which we have referred, and against others, including all of the appellants in the present appeals, except appellant Garthe, in which cross-bill it is alleged that in equity the complainants in the original bill were entitled to have the fund derived from the building of the life-saving stations applied first to the payment for labor performed and materials supplied in the construction of the said stations, for which the said original complainants would be liable as sureties under their bond. This cross-bill sought dissolution of the partnership of Baldwin & Peake, and the settlement of partnership affairs, the distribution of assets, and the appointment of receivers. In this cross-bill were alleged certain facts in regard to the execution of the power of attorney to Riley, and the intention and purpose thereof, and that such purpose and intention had been and were being perverted by Riley; and the bill prayed for the reformation of said power of attorney and the construction thereof, in order to effectuate the intention and purpose alleged. This cross-bill was not answered by Riley, or the other members of the

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Statement of the Case.

creditor's committee, but testimony was taken in support of the allegations of the bill, and a final decree thereon was passed on the 26th of January, 1900, taking the bill *pro confesso*.

By the decree thus passed, the partnership was declared dissolved, and the proceedings were referred to the auditor to state the necessary accounts with a view to winding up the affairs of the firm. Riley was required to discover and render an account of all moneys and other property in his hands, and to discover and show in what manner he had applied the money that had come into his hands, so far as it had been applied. The decree then provided and declared: "That said power of attorney, dated the 26th day of August, 1898, be and the same is hereby construed so as to entitle the cross-complainant, Peake, to have first paid out of any funds received by the said defendant, Thomas R. Riley, from any particular structure or building all claims for labor and materials employed and expended in and about the completion thereof, before any of the funds so derived shall be applied to the payment of any of the general indebtedness of said firm; and in so far as it has been found that funds have been diverted by the said Thomas R. Riley from the payment of such labor and material claims aforesaid, it is hereby ordered, adjudged, and decreed that the said Riley be, and he is hereby held personally liable therefor and charged therewith, in his accounts before said auditor; and it is further ordered, adjudged, and decreed that defendants Samuel Ross and S. D. Lincoln acquired no right in or power under the said paper writing or power of attorney given by the said Baldwin & Peake to said defendant Riley."

There was no appeal taken from this decree, and it, therefore, stands unreversed and in full force. By this decree, the priority of right of the claimants for labor and materials furnished for the construction of the life-saving stations, was clearly adjudged.

It will be observed that by the order appointing the temporary receivers, they were directed to take charge of all of the affairs and business of the firm of Baldwin & Peake, and

to collect all money due and payable to that firm from any and all sources whatever. The order in its broad terms included the money for the building of the life-saving station at Hog Island as well as the other three stations; and that being so, the United States Fidelity and Guaranty Company, the surety on the bond of Baldwin & Peake to the United States for the construction of the station at Hog Island, applied for leave to intervene, and the leave being obtained, the company filed a bill alleging the facts, and prayed for the same relief as against the defendants in respect to the fund accruing from the Hog Island station as that sought by the original complainants in respect to the other three stations. The facts appear to be the same *mutatis mutandis*.

By this intervening bill, filed by the United States Fidelity and Guaranty Company, it was alleged that there were claims outstanding for labor and materials furnished and used in the construction of the Hog Island station; and that, unless the defendant Riley was restrained from diverting the fund paid on account thereof, he would apply it to the payment of claims, including a claim of his own, incurred in and about the construction of other buildings, to the prejudice of the creditors whose claims were incurred in the construction of said Hog Island life-saving station, and of the United States Fidelity and Guaranty Company, the surety on the bond of said contractors.

In the progress of the cause permanent receivers were appointed (one of whom being the said Thomas R. Riley), and they collected from the treasury of the United States the money due for the construction of all four life-saving stations, amounting, in the aggregate, to the sum of \$17,030.42, as shown by schedules B and C filed by the auditor with his report. By schedule F it is shown that Riley, as agent, had received from the District of Columbia and disbursed the sum of \$27,579.83, under the contracts for building the schoolhouses.

Upon the reference to the auditor a large volume of testimony was taken, and upon which he based certain findings,

and founded his report,
hands of the receivers.
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Mr. W. C. Prentiss a
appellants, The Alfred
Reilly, James Bennett,

1. In the absence of s
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App. D. C. 49; *United*
Brick Co. v. District
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v. Young, 10 Wheat. 40
supra; *Breen v. Kelly*,
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Fitzgerald, 21 Fed. Re
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Cl. 217. *United States*
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2. The claim of the l
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coercion. There is no general doctrine of equity that supports the right of the laborer or materialman to preference out of the proceeds of the work to which his labor or material has contributed. *Fosdick v. Schall*, 99 U. S. 235. The act of 1894, to afford materialmen security, was passed for two reasons, first, because subcontractors theretofore had no lien or security (see report of committee printed in appellant's brief in *United States to use of Marble Co. v. Burgdorf*, 16 App. D. C. 140), and second, to relieve the government officers from the annoyance and trouble of giving attention to such claims. Proper application of the doctrine invoked by the auditor, if such doctrine were supportable, would extend the same preference to the schoolhouse creditors in respect to the fund from each schoolhouse, and require that the fund from each schoolhouse be determined, followed and restored for distribution. Neither the schoolhouse creditors nor the life-saving station creditors as shown before had any legal or equitable claim, title or lien to or upon the contract money in the hands of the District or the United States, or any power in themselves to control it in any way. *Brick Co. v. District of Columbia*, 1 App. D. C. 351. The District, however, was withholding payments by reason of unpaid claims brought to its attention. Thus the matter might have stood indefinitely, for so long as just claims remained unpaid there was lacking full performance on the part of the contractors. *Knapp v. Swaney*, 56 Mich. 345. Under these circumstances Baldwin & Peake, being unable to proceed, executed the agreement appointing Riley their attorney in fact to finish the work and receive all money for the equal benefit of the life-saving station and schoolhouse creditors. But the schoolhouse funds withheld by the District being the only money available for carrying on the work and the District authorities refusing to pay over the money so long as claims remained filed with them, counsel for Baldwin & Peake prepared the further paper which, by its terms, recited approval by all the creditors and contemplated the withdrawal of claims filed with the United States as well as those filed with the District. This paper was presented

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Argument of Counsel.

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to the schoolhouse creditors, and being signed and acted upon by them afforded an actual consideration for the power of attorney to Riley and the trust created therein. Far from being an arrangement whereby the creditors signing assumed the character of builders and contractors, their signatures were obtained upon the representation that the arrangement was approved by the life-saving station creditors and the whole effect of the action of the signing creditors was to release a fund upon which they had no lien and to which they had no legal or equitable claim. *Brick Co. v. District of Columbia*, 1 App. D. C. 351. There is no foundation whatever in the record and none in fact for the assumption by the court below that the schoolhouse creditors went into partnership with Baldwin & Peake or put themselves in the place of that firm. That the life-saving station creditors had the statutory bond to resort to cannot give them any right to preference. It gave them merely the personal liability of the contractors and their sureties in exchange for their material and labor, and gave them that security for the very reason that they had no lien or claim upon the buildings or the contract price. The sureties can have no higher or greater equities in the application of the fund than the claimants to whom they may be liable. The extent of their right is that they may stand in the shoes of the creditors and enforce for their exoneration any lien of the creditor on the estate of the principal and may bring any suit in equity which the creditor might bring for the settlement of accounts and administration of assets, the creditor being a party in order that he may receive the money recovered. Brandt on Suretyship, etc., Sec. 192, p. 273. But in no case can the surety be entitled to any greater relief than is the creditor. A bill to enforce payment of money except by way of enforcement of a lien or trust cannot be maintained. *Lamon v. McKee*, 18 D. C. 446. As the life-saving station creditors had no lien the application of the sureties here must be either to enforce the trust created in the power of attorney to Riley or to secure the payment of the dividend due the life-saving station claimants as general creditors, and

in either case there could be no preference. The sureties are not in a position to entitle them to claim such relief.

3. During the progress of the suit Peake, by a cross-bill, sought to have the power of attorney to Riley reformed to conform to a draft of such a paper filed as an exhibit to that cross-bill, and procured a decree, not reforming the instrument, but attempting to construe it for his benefit. This decree did not bind the creditors who had signed the creditors' agreement based upon the power of attorney to Riley as executed, they not being parties to the cross-bill; but even that decree goes no further than to declare the meaning of the power of attorney to be that indebtedness incurred by Riley in the *completion* of the work shall be first paid. Furthermore, this decree was entered without notice, after the reference to the auditor, under which the appellants' rights in the suit accrued. But even had the decree upon this cross-bill been binding and adverse, the question is before this court on appeal. The ground of Peake's prayer for reformation of the power of attorney is apparently *mistake*, but there is no allegation that the mistake was mutual or that there was any misunderstanding upon the part of any one but himself, and he claims relief merely because he signed the paper without reading it. There is, therefore, no foundation for a decree reforming the instrument or construing it otherwise than its language demands. The power of attorney to Riley is valid. Being for the benefit of creditors and covering the whole fund it is not within the prohibition of R. S. 3477 and 3737. *Goodman v. Niblack*, 102 U. S. 559. It was given for an actual consideration, the agreement upon the part of the creditors. It, therefore, created a valid trust in favor of the creditors mentioned in it. As an equitable, or even legal, assignment it was perfected by notice to the District and the Treasury Department. The power of attorney to Riley, and the agreement signed by the creditors must be read together. Each contemplates and creates one general class of beneficiaries, the schoolhouse and life-saving station creditors, to share equally in the proceeds after the cost of completing all the

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work is first paid. Such equal distribution is demanded by the principles of equity and preferences could be created only by clear and unequivocal language. And even then any such attempted preference would seem to be void as in violation of section 2 of the act of February 24, 1893, 24 Stat. 474. But even were any preference to be allowed claims upon a particular building to be paid out of the proceeds of that particular work, it would still be necessary to follow and restore the schoolhouse money and identify a fund from each of the five buildings, for distribution among the claimants thereon.

4. Witthaft's claim to preference is based wholly upon the testimony of Peake in support of his cross-bill and before the auditor in behalf of Witthaft to the effect that he procured Witthaft's indorsement of notes to be discounted at the National Capital Bank upon the understanding that as soon as he got the money from the life-saving stations he would pay the notes, the two notes afterwards being renewed in one; and upon Peake's testimony that after Riley's appointment he called the latter's attention to this note and Riley made some vague promises. A mere promise to pay a debt out of a particular fund will not operate to give the creditor a lien upon that fund. 1 Jones on Liens, Sec. 48, 52; 13 Ency. Law (1st ed.), 609, cases note 1; 2 Ency. Law (2d ed.), 1068, cases note 3. This doctrine is firmly settled by the Supreme Court of the United States. *Dillon v. Barnard*, 21 Wall. 430; *Burke, exr. Trist, v. Child*, 21 Wall. 441; *Christmas v. Russell*, 14 Wall. 70. And has been established by our Court in General Term. *Wood v. Dickinson*, 18 D. C. 301. See also *Dexter v. Gordon*, 11 App. D. C. 60.

5. The power of attorney to Riley for the benefit of the creditors was a *bona fide* assignment for value, and Riley and the creditors are in the position of junior assignees without notice; and Riley having expended the schoolhouse money upon the faith of such assignment and been recognized by the Secretary of the Treasury (who directed checks to be delivered to him), they take precedence of Witthaft,

even had the latter had an assignment which could be recognized otherwise. *Spain v. Brent*, 1 Wall. 604; *Spain v. Hamilton*, 1 Wall. 623; *Judson v. Corcoran*, 17 How. 612; *Laclede Bank v. Schuler*, 120 U. S. 511; *Bank v. Trust Co.*, *supra*. The necessity of restoration of the schoolhouse fund would also apply to Witthaft's claim. But a final and complete answer to Witthaft is that such an assignment as he claims is absolutely void under sections 3477 and 3737, R. S. *Goodman v. Niblack*, 102 U. S. 559; *Burke, exr. Trist, v. Child*, 21 Wall. 441; *Spofford v. Kirk*, 97 U. S. 484. *Conde v. York*, 168 U. S. 642, was dismissed in the Supreme Court for want of jurisdiction without passing on this question. If anything it supports the Riley assignment as against Witthaft's claim.

6. Riley is not entitled to compensation. He accepted the trust with the distinct understanding that he was to act without compensation. Peake so testifies, and Riley, testifying before the auditor, can only say that he can't recollect that there was such an agreement, but admits that the subject was mentioned. The auditor and the court below seem to have overlooked Peake's testimony. His services were voluntary. He was one of the largest creditors and his services were for his own benefit. *First Nat. Bank v. Owen*, 23 Iowa, 185. There is no agreement for compensation in the power of attorney, and that instrument disposes of the whole fund, evidencing the intention and understanding that no compensation should be received. The action of the court below in removing Riley as trustee or custodian of the fund and appointing receivers, could only have been based upon misconduct or intended breach of trust, and in such case a trustee forfeits any right to compensation. 27 Ency. Law, 187. If entitled to compensation at all, Riley is not entitled to preference. Having disbursed all the money received by him he had no fund in his hands upon which he could have a lien. In such case he has only a claim against Baldwin & Peake and could come in only as a general creditor. Perry on Trusts, Sec. 609.

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Mr. James Francis Smith, for the appellant William Garthe.

Mr. Clarence A. Brandenburg, for the appellees the United States Fidelity and Guaranty Company and John N. Hart.

Mr. John Goode, for the appellee Jonathan Woodhouse.

Mr. D. W. Baker, for the appellees H. B. Davis & Co., and the Southern Oil and Supply Company.

Mr. George H. Lamar, for the appellees Louisa H. Bride and Frederick J. Miller, executrix and executor of William Witthart, deceased, and Alexander E. Warner and Edward B. Hughes.

Mr. Sidney T. Thomas, for the appellee Thomas R. Riley.

1. Riley was practically the receiver of Baldwin & Peake. The situation of Mr. Riley under the power of attorney from Baldwin & Peake was like that of a receiver. He took up the unfinished life-saving stations and completed them to the satisfaction of the Treasury Department. He completed the school buildings to the satisfaction of the commissioners of the District. He collected and disbursed \$29,120.20, in the execution of his trust. Had he been appointed receiver instead of the attorney of Baldwin & Peake the court would have allowed him 10 per cent. for his services. The court below allowed the receivers 10 per cent., and they were appointed when the work was finished and there was nothing to do but collect the balance of moneys due Baldwin & Peake.

2. Professor Newmark, in his article on "Receivers" in the Am. & En. Ency. of Law, Vol. 20, page 168, speaking of the compensation of receivers, says: "A receiver, unless it is otherwise ordered, as where he consented to act without

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a salary, will be allowed a salary, or have some other allowance made to him for his care and pains in the execution of his duties, and the right of a receiver to compensation is not impaired by the fact that the actual work of managing the property intrusted to him is performed by others." See also Beach on Receivers, 822.

3. The auditor's findings are conclusive. The court below referred the amount of Mr. Riley's compensation to the auditor. There was no error in this, and the finding should not be disturbed except for some manifest error. *Richardson v. Van Auken*, 5 App. D. C. 209; *Grafton v. Paine*, 7 App. D. C. 255. The compensation to be allowed a receiver is a matter of sound judicial discretion in the court below. *Cake v. Mohun*, 164 U. S. 311. In *Cake v. Mohun*, *supra*, the auditor allowed Mohun, as receiver of the Hotel Normandie, 10 per cent. on collections, 5 per cent. on disbursements, and a counsel fee of \$500; and this in a case where the receiver was "not prevented from giving his usual attention to his private business, and ordinarily spent only his evenings at the hotel." In this case the auditor finds that Mr. Riley not only raised money to assist in carrying on the work, but "gave to the subject-matter of his agency a substantial portion of his time and service until the appointment of the temporary receivers."

4. Mr. Riley's services were not voluntary. There is absolutely no foundation for the contention that Mr. Riley gave his services voluntarily. He was asked if he did, and he testified that he did not, and there was no evidence to the contrary. So far as Mr. Riley's compensation is concerned there is no error in the record, and the decree of the court below should be affirmed.

Mr. George Francis Williams and Mr. Charles F. Benjamin, for the appellee Richard Rothwell.

Mr. Andrew Y. Bradley, for the appellee the John L. Roper Lumber Company.

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Mr. Chief Justice ALVEY delivered the opinion of the Court:

Though the testimony taken was quite voluminous, a very small part of it is contained in the record before us. We have only a few extracts from the testimony of the many witnesses that were examined, but such parts as have been incorporated are supposed to be sufficient to enable us to pass upon the questions raised by the exceptions. It is manifest, however, that we cannot review the auditor's findings, so far as they depend upon conclusions deducible from the evidence produced before him, and not contained in the record before us. We can, however, seeing the general nature and character of the claims, and the relation of the several parties to the funds for distribution, determine and declare the principles that must control in making distribution of the funds in controversy.

1. Of the several questions presented, the first and most leading of them is that which relates to the claims of the parties who furnished labor and materials in the construction of the life-saving stations, and, consequently, the rights of the sureties on the bonds given the government to secure the faithful performance of the contracts by the contractors for the work. This question is dependent upon the terms of the act of Congress of August 13, 1894 (28 Stat. 278), and the bonds of the contractors taken in pursuance thereof.

By the act of Congress just referred to, it is provided that all persons entering into any formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs thereof, "shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract;" and the statute further provides, that any person so furnishing labor and materials, and having an unpaid claim therefor, shall, upon application, as the statute directs, be furnished

with copies of such contract and bond, and have a right to sue and recover thereon, in the name of the United States, for his or their use, against such contractor and sureties. The bonds of the contractors in this case, given for the faithful execution of the work on the life-saving stations, contain the condition prescribed by the statute. And the question is, what is the effect of the provision of the statute and the condition of the bonds executed as the statute requires, in respect to claims for labor and materials?

There is no mechanic's lien law that applies to or that can be enforced against buildings erected for the government. But the statute just recited makes provision that is intended practically to serve the same beneficent purpose of a mechanic's lien law. It creates no lien, it is true, against the building erected, but it makes provision for securing the payment of the contractors of all claims for labor and materials furnished in the erection of the buildings, or, in default of payment by the contractors, that the bond and sureties thereon shall be liable to such claimants. As was said by the Circuit Court of Appeals of the United States, in the case of *United States, to the use of Foundry Company v. National Surety Company*, 92 Fed. Rep. 549, "The bond which is provided for by the act, was intended to perform a double function; in the first place to secure the government for the faithful performance of all obligations which the contractor might assume towards it, and, in the second place, to protect third persons from whom the contractor obtains materials and labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties, that they shall be paid for whatever labor and materials they may supply, and enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, one for the benefit of the government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments. * * * The act bears every evidence that it was intended to provide a security for laborers and material-

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men on which they could rely confidently for protection, unless they see fit by their own dealings with the contractor, to relinquish the benefit of the security." There is, therefore, by necessary implication, an equitable lien and preference secured in favor of the parties who furnish labor and materials in the execution of the contract, in the application or distribution of the contract price remaining to be paid; and where the government, as in the present instance, holds in its hands any part of the money contracted to be paid for the work, and there remain unpaid claims for labor and materials supplied, it holds such fund as *quasi* trustee for the benefit of those entitled to receive it under the condition in the bond; that is to say, the laborers and materialmen remaining unpaid. This right to preference being the result of the operation of the statute and the condition of the bond, it is the clear right, upon the plainest principles of justice, of the sureties in the bond to invoke a court of equity to enforce the preference and equitable lien for their protection. In construing this act of Congress of 13th August, 1894, this court said, in the case of *Marble Company v. Burgdorf*, 13 App. D. C. 506, 519: "The practical effect of the statute is to confer a special lien in favor of such persons (parties furnishing labor and materials) and to substitute the bond, in the place of the public building, as the thing upon which that lien is charged." That is to say, the bond is liable rather than the building upon which labor and materials are used in construction; and if the sureties should pay claims for such labor and materials for which they may be responsible on the bond, they have a right, upon well-settled principles, of substitution to such claims as against the contract price of the work remaining due to the contractor. And having such right of substitution, the sureties have a right to interpose to prevent the diversion or misapplication of the fund, and to require it to be paid out to the parties entitled to receive it in the first instance by virtue of the lien and preference given by operation of the statute."

The principle we have stated seems to have been applied by the auditor in the distribution of the funds arising from

the life-saving stations, though, as it appears, with a departure in some particulars. The rights of the claimants for labor and materials, and the consequent rights of the sureties on the bonds of the contractors being fixed, those rights could not be displaced or derogated from by the power of attorney to Riley, or the subsequent agreement by creditors, to which the claimants for labor and materials supplied to the life-saving stations were not parties, either in favor of Riley himself, or other creditors than those signing the agreement, or those represented by those who did sign it. The power of attorney to Riley was wholly inoperative as against such creditors of Baldwin & Peake.

2. The creditors of the firm of Baldwin & Peake, who furnished labor and materials for the construction of the schoolhouses erected in the District of Columbia, stand on quite a different footing from those furnishing labor and materials for the life-saving stations. The funds arising under the contracts for the schoolhouses were paid over to Riley, who received them under the power of attorney made to him, and the agreement made between the schoolhouse creditors. As in the case of contracts for the erection of buildings for the United States, there is no mechanic's lien law that can be enforced against the public buildings erected for the municipal government of the District, and there is no such statutory provision applicable to building contracts made by the District government as that contained in the act of Congress of August 13, 1894. The contracts for the building of the schoolhouses in the District contain the following clause:

"Contractors will pay the workmen who shall be employed by them upon the work under their contract punctually, in cash current, and not in what is denominated store or pay orders, and will, from time to time, and as often as may be required by the commissioners, furnish satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required; and if such evidence is not furnished, such sum or sums as may be necessary for such payments may, *in the discretion* of the com-

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missioners, be retained until such claims shall be fully satisfied."

This provision of the contract, however, does not create an enforceable lien or preference in the distribution of the fund remaining in the hands of the commissioners in favor of the parties furnishing labor and materials for the building. It only invests the commissioners with power *to be exercised in their discretion*, to require the contractors to discharge unpaid claims for work and materials furnished, by withholding the amount of such claims until they were satisfied by the contractors. The provision of the contract was manifestly intended to avoid trouble and delay in the prosecution of the work, and the possible attachment by workmen and materialmen, and, at the same time, to require justice to be done to the claimants by the contractors. But no lien was given for such claims. As said by this court, in the case of *Brick Co. v. District of Columbia*, 1 App. D. C. 351, in construing a similar clause of the contract in that case: "There is nothing in this clause of the contract that constitutes the municipal corporation a trustee for those who might deal with and trust the contractors with the municipality." In other words, there was no lien or preference thereby created.

3. It is claimed by the appellants in these appeals that a considerable amount of money paid on account of the contracts for the erection of the school buildings in Washington city, and to which they would have been entitled, was wrongfully applied and expended in the construction of the life-saving stations, and especially that at Hog Island; and that, by reason of that fact, they are entitled to reimbursement from the funds arising from the construction of the life-saving stations, to the extent of such expenditures, particularly the station at Hog Island; and that, consequently, there should be a curtailment of the funds received on the contracts for those stations, to the extent of the expenditures so made, and the amount thereof added to the funds received on the contracts for the school buildings. But manifestly this contention cannot be maintained upon any principle of law or equity.

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In the first place, the money that was paid on the contracts for the building the schoolhouses in Washington city, whether to Baldwin & Peake directly, or to Riley, their agent, was paid in performance of the contracts as the money became due thereon, and the money so paid at once became the money of Baldwin & Peake, the contractors, and they could apply it as they deemed proper.

Moreover, all the present appellants, except William Garthe, were active in procuring the money due for the erection of the District schoolhouses to be paid over to Riley, the agent of the contractors; and whatever portion of that money, if any, that may have been applied in the construction of the Hog Island life-saving station, or any of the other stations, the evidence wholly fails to show, and this was the finding of the auditor. There is no evidence in the record to trace and identify the money, if any, derived from the schoolhouse contracts, that was applied to the construction of either or any of the life-saving stations; and this of itself would be a sufficient answer to the contention of the appellants.

There seems to be some confusion as to the grounds upon which the appellants claim to derive benefit from the funds derived from the contracts for the life-saving stations. In the exceptions taken to the auditor's report, among the many specifications of alleged error, it is alleged "that the funds from said four stations were created entirely, or nearly so, by funds received from the schoolhouses in Washington city by Riley, as attorney and trustee, and used by him in completing the said stations, and, therefore, the schoolhouse funds must be followed and restored. That the schoolhouse creditors are entitled to subrogation to the rights of those who received schoolhouse money from Riley, for labor and materials, contributed towards completing the four life-saving stations, and, in any event, must have a *first lien* on the funds from those stations."

As we have said, the fact here alleged is denied, and there is no evidence of its existence. But if it were true that any part of the money received on the contracts for the building of the schoolhouses had been applied, either by the con-

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tractors themselves, or by their agent Riley, in the completion of the life-saving stations, the principle of substitution or subrogation could have no application to such case. There is no foundation whatever shown for the application of such doctrine. As held by all the authorities, it is only in cases where the person advancing the money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity will substitute him in the place of the creditor, as matter of course, without any agreement to that effect. But, in other cases, the demand of a creditor, which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished. *Sanford v. McLean*, 3 Paige, 116. The doctrine is very fully and clearly expounded in the opinion of Mr. Justice Miller of the Supreme Court, in the case of *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 550. In the present case, the money that was paid over by the government to the receivers was paid as the money of the contractors, earned and due according to the terms of the contracts, and not as money to which third parties were entitled by way of substitution for money voluntarily advanced for the completion of the contracts. There is no place, therefore, for the application of the doctrine of substitution, even if it were shown that money paid on the schoolhouse contracts had been applied to the contractors, or their agent, in the completion of the life-saving stations. The most that the exceptants and appellants could claim, with any apparent reason, is, that all the funds, derived under the several contracts, as well those for the construction of the life-saving stations as those for the construction of the schoolhouses, should be distributed as a whole and *pari passu* among all the creditors of Baldwin & Peake. But this, as we have shown, cannot be done.

4. Another exception taken to the auditor's report is to the preferential allowance of commission to Riley out of the funds received and disbursed by him,— and to be paid out of funds in the hands of the receivers — the commission

amounting to the sum of \$2,334.72,—as compensation for services rendered under the power of attorney. In the exception, it is objected that no compensation should have been allowed to Riley to be paid out of the funds in the hands of the receivers, other than regular commissions to him as one of the permanent receivers. As reasons for this exception, it is alleged in the exception filed, that Riley had no fund in his hands upon which he could have a lien at the time the original bill was filed; that he was not entitled to any lien for compensation; that he had no equitable or legal right to preference, if entitled to any compensation at all, as attorney in fact; that if he had any claim for such compensation it was only as general creditor of Baldwin & Peake; but that the evidence shows that he was entitled to no compensation whatever, as such attorney for Baldwin & Peake.

This allowance to Riley as commission for services under the power of attorney, in addition to the commission allowed him as one of the permanent receivers, is given the same preference as is given to the allowance of costs and expenses of the litigation and to the commissions allowed to the receivers appointed by the court. In this, we think, there was manifest error. It is very clear that Baldwin & Peake had no power to affect or displace the liens of the claimants for labor and materials furnished for the construction of the life-saving stations; and it is equally certain that the power of attorney created no lien or preference for commission superior to the claims of those who furnished labor and materials for the construction of the school buildings in the city of Washington. The attorney, Riley, simply stood in the place of and represented the contractors in what he did under the power held by him; and he acquired no superior rights to compensation to any other employee of the contractors. The power of attorney contains no provision for commission or compensation to the agent appointed thereby; and Riley does not testify himself that there was any definite agreement that he was to receive compensation, and Peake is explicit in testifying that it was understood and agreed that he was not to receive compensation; but that his services were

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to be rendered in the interest of the creditors,—he, Riley, being one of the most considerable in amount. On the meagre evidence contained in the record we will not determine that he is not entitled to any compensation at all; but we do hold and determine that if compensation be allowed, it can only be as a general creditor of Baldwin & Peake. All the money that he received and disbursed was received on account of the contracts for the building of the schoolhouses, according to the auditor's report, and no part of it from the life-saving stations.

5. Another preferential allowance made by the auditor, and distributed to in schedules B and C from the funds arising from the life-saving station contracts, is the claim of William Witthafft for money paid as indorser of notes made by Peake and discounted in bank, the proceeds of which are claimed to have been applied in the construction of the life-saving stations. The preference given to this claim over the general creditors is founded upon the testimony of Peake, one of the contractors. In his testimony, given upon two occasions, in relating the circumstances under which the notes were made and indorsed, and how the matter was subsequently treated, he says: "This was the renewal of two notes we had gotten discounted at the National Capital Bank. We needed money very badly in the prosecution of the work on the life-saving stations, and on two different occasions I got him (Witthafft) to indorse notes for me, and when they came due we had not the money and the two notes were merged into one, with the understanding that when I got the money from the life-saving stations he was to be paid." That at the time the original note was indorsed by Witthafft, "one station was completed, and another was very nearly completed, and another one about half completed;" and at that time about \$8,000 or \$10,000 had been paid to the sub-contractors on the work. That these facts were all explained to Mr. Witthafft before his indorsements were obtained. I told him that just as soon as we got the money from the life-saving stations we would take up this note; I told him that frequently; I told him so before his indorsement of the note.

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I also told the president of the bank that we had a great deal of money coming from the life-saving stations, out of which I would certainly pay off this note. The money was expended on the life-saving stations; it was all sent down there to be paid by the foreman." On further examination he says: "I explained how far we were advanced with the work, how soon I expected it to be done, and when I expected the money, and made him (Witthafft) a positive promise to give him the money out of the money received. I did not promise to pay it out of the first money that I should get from any source; but out of this particular fund derived from the life-saving stations."

The auditor and the court below in allowing preference to this claim over the claims of the general creditors of the firm of Baldwin & Peake, appear to have acted upon the principle that, according to the testimony of Peake, there was an equitable assignment of so much of the fund that might thereafter become due and be received on the contracts for the construction of the life-saving stations as would be sufficient to pay off the notes indorsed by Witthafft. If such a contract of assignment was in a proper legal sense made, it could only be, of course, in subordination to the lien and preference secured to parties furnishing labor and materials to the construction of the life-saving stations. But, we think, there was clear error in supposing that any such equitable assignment was shown to exist. The funds were not really in existence at the time when the notes were made and indorsed, and when they subsequently came into existence they were subject to the superior claims for labor and materials supplied, and those claims might exhaust the entire funds. The promise relied on did not profess to give the promisee control of the fund, or any particular part of it; it was only a personal promise that some part of the funds, when received, should be applied to the taking up the notes. As said by the Supreme Court, in the case of *Christmas v. Russell*, 14 Wall. 69, 84: "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no

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greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund — any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fundholder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fundholder is bound from the time of notice.” It is upon this principle that a bill of exchange or check is not an equitable assignment *pro tanto* of the funds of the drawer in the hands of the drawee. The same principle has been enunciated and applied by this court, in the case of *Bank v. Trust Company*, 17 App. D. C. 112. See also the cases of *Dillon v. Barnard*, 21 Wall. 430, 439, and *Trist v. Child*, 21 Wall. 441.

6. There are other claims made subject to the general exceptions to the auditor's report, and which are involved in these appeals. The claim of John N. Hart is one of these, which was allowed a preference over general creditors and distributed to in schedule C. The claim is against the fund arising from the contract for the construction of the Hog Island life-saving station, and which appears to have been allowed by stipulation and under an order of court from which there was no appeal taken. We can perceive no available objection to the preference given to this claim in the distribution of the fund distributed in schedule C. It was clearly properly allowed.

The claim of I. Woodhouse for materials furnished to the life-saving stations at Caffey's Inlet, False Cape, and Dam Neck, allowed as a preferred claim and distributed to in schedule B, would seem to be subject to no valid objection. We think the claim was properly allowed.

It follows from what we have said that the order of the court below overruling all the exceptions to the auditor's report, distributing the several funds, must be reversed, and the cause be remanded for a restatement of accounts in accordance with the foregoing opinion.

There were motions filed to dismiss two of the appeals, numbers 1082 and 1083, upon several grounds. But it being afterwards discovered that there was error as to the matter of fact upon which the motions were founded, the motions were abandoned, except as to the one ground for the motion, founded upon the allegation that the appeal bonds were approved by one of the justices of the Supreme Court of the District without notice having been first given to the appellees to show cause against the approval. But, we think, this ground is not sufficient for the dismissal of the appeal. We cannot say that the approval of the bond without such notice is a nullity; at most it would be but an irregularity. This court is required, by the act of Congress, of July 30, 1894, to make rules "to regulate all matters relating to appeals, whether in the court below or in said Court of Appeals." The subject is regulated by rule X of this court, and by that rule such notice is not required to be given as a prerequisite to the approval of the bond by the justice below. While such notice may be proper in particular cases, in the discretion of the justice called upon to approve the bond, it is not a condition precedent, the non-observance of which will nullify the bond. The matter cannot be controlled to the extent of nullifying the bond after approval, because of the non-compliance with a rule of the court below, requiring notice to be given to the appellees to show cause against the approval of the bond proposed for approval.

The motions to dismiss must, therefore, be *overruled*.

Order appealed from *reversed*, and cause remanded for further proceedings, in accordance with the foregoing opinion.

D. C.]

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No. 1090. Submitted June 18, 1901. Decided October 11, 1901.

HEARING on a motion by the appellant to vacate an order dismissing an appeal. *Denied.*

The facts are stated in the opinion.

Mr. A. B. Duvall, attorney for the District of Columbia, and *Mr. Clarence A. Brandenburg*, assistant attorney, for the motion.

Mr. Charles A. Douglass, *Mr. A. E. Leckie*, and *Mr. Levi H. David*, opposed.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

On the 4th of May last there was a motion filed to dismiss the appeal brought into this court, upon the ground that the transcript had not been filed in due time as required by rule XV of this court. The motion was resisted by the appellant, and briefs were filed on both sides. Shortly before the close of the session of the last term of the court, we took up the matter of the motion to dismiss, and, upon the facts disclosed, we concluded that the motion to dismiss was well founded, and that we could not do otherwise than dismiss the appeal; and it was so ordered.

Shortly afterwards, and just before the close of the session, there was filed by the appellant a motion to have the order of dismissal vacated, and that the appeal be placed upon the calendar to be argued in regular course. And in support of, and also against, this latter motion, affidavits were filed by the respective parties. We have examined the facts, but discover no sufficient ground for a change of our former conclusion, and, therefore, the motion to vacate must be denied.

We deem it proper, however, in view of the practical im-

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there would be in reality no limit to the time within which a transcript could be filed,—that right being made to depend entirely upon the indulgence of the judge below. This is clearly not the intention of the rule.

In the affidavit of counsel filed by the appellant in support of the motion to vacate the order of dismissal, it is stated "that affiant gave direction to one of his assistants to procure an order on March 30th, for the extension of time for filing transcript in the Court of Appeals, but for some reason such order was not obtained. Whereupon affiant's attention being called to the matter, he procured the order extending the time to file the transcript on April 3, 1901, three days after the time allowed by the rules for filing the transcript." But the reasons assigned in this affidavit for the oversight in regard to the order clearly do not relieve the case of the difficulty. It is manifest that the rules of this court designed to regulate the prosecution of appeals to it, have not been observed. The rules of court for the regulation of its practice and the orderly transaction of business therein are indispensable; and all courts of record have an inherent power to make such rules. But with respect to this court, as to the matter of regulating the prosecution of appeals thereto, the act of Congress of July 30, 1894, expressly provides that this court "shall make such rules and regulations as may be necessary and proper for the transaction of its business and the taking of appeals to said court." And further, by such rules, "to regulate all matters relating to appeals, whether in the court below or in said Court of Appeals." In pursuance of the power thus given, rules have been adopted by this court to regulate the matter of taking appeals and preparing the same for hearing, as shown by rules X to XVI, inclusive, and rule XV regulates the matter of the present controversy.

These rules would be but of varying force, and of little value either to the court or suitors, and consequently very imperfect regulations of the subject, if their limitations and provisions could be dispensed with upon any and all occasions when circumstances might show a possible hardship to

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Opinion of the Court.

the party who had failed to observe the requirements of the rules, whether such failure be occasioned by mistake, oversight, or otherwise. But these rules, so long as they remain unrescinded, cannot be dispensed with by the court to meet the apparent hardship of any particular case, in the absence of fraud. They have the force of law, and are binding upon the court, and upon the suitors and those who represent suitors. This is the principle that prevails generally in the courts of the country. The case of *Thompson v. Hatch*, 3 Pick. 512, is a leading case upon this subject. There, a rule of the Court of Common Pleas provided that a plea in abatement "may be filed at any time during the first four days of the return term, and not afterwards." A plea in abatement, in consequence of misinformation from a judge of the Court of Common Pleas, was not offered until the fifth day of the term, and was then, by leave of the judge, filed as of the fourth day. This ruling was taken to the Supreme Court of the Commonwealth by appeal, and that court, in reviewing the ruling of the court below, said: "But a rule of the court thus authorized and made, has the force of law, and is binding upon the court, as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. In the case before us, the plea was allowed to be filed on the fifth day of the term, although the rule allows but four days for the purpose. The circumstances were such as would justify that order of the court, if it had had power to pass it; but we are satisfied that no one judge of the Court of Common Pleas, or of this court, has authority to dispense with rules deliberately made and promulgated, on account of the hardship of any particular case, any more than he would have authority to dispense with any requisition of the legislature itself. The courts may rescind or repeal their rules without doubt, or in establishing them may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it."

That case has been repeatedly affirmed in subsequent

cases by the same learned court,— as in the case of *Tripp v. Brownell*, 2 Gray, 402, and *Baker v. Blood*, 128 Mass. 545. The same principle has been sanctioned and followed in a large number of the highest State courts of the country, as shown by reported cases. *Wall v. Wall*, 2 Har. & G. 79; *Hughes v. Jackson*, 12 Md. 450; *Ogden v. Robertson*, 15 N. J. L. 124; *Owens v. Ranstead*, 22 Ill. 161; *Magnuson v. Billings*, 152 Ind. 177; *Walker v. Ducros*, 18 La. Ann. 703; *State v. O'Day*, 68 Iowa, 213; *Maberry v. Morse*, 43 Me. 176; *State v. Edwards*, 110 N. C. 511; *Maultsby v. Carty*, 11 Humph. 361.

The same principle has been fully adopted and applied by the Supreme Court of the United States, in the recent case of *Rio Grande Irrigation and Colonization Co. v. Gildersleeve*, 174 U. S. 603, 608. That was an appeal from the Supreme Court of the Territory of New Mexico, and the only question presented to the Supreme Court of the United States was, whether the Supreme Court of the territory erred in affirming the judgment of the trial court denying the defendant's motion to vacate a judgment entered in default of an appearance. The judgment by default was entered in vacation of the court, and during the next succeeding term, a motion was made on behalf of the defendant company to vacate the judgment. This motion was denied, and a few days thereafter, another motion, accompanied with an affidavit of defense on the merits, was filed, and this motion was likewise denied. The rule of the court below applicable to the case provided as follows:

“ No motion to set aside any finding or judgment rendered in vacation shall be entertained, unless it shall be filed and a copy thereof served upon the opposite party within ten days after the entry of such finding or judgment.” The motion to vacate was not filed until after the lapse of about two months; and this was held to be too late. The Supreme Court of the United States, in affirming the ruling of the Supreme Court of the Territory, said, that as no discretionary power was reserved to the trial judge, he could not dispense

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Motion to vacate the

MACFARLAND

v.

UNITED STATES OF AMERICA EX REL. MILLER.

BUILDING REGULATIONS; SUBDIVISIONS OF LAND; MANDAMUS.

1. Section 34 of the building regulations, providing that blocks of two or more dwelling-houses shall not be erected until the land upon which they are to be erected has been subdivided, so that each house shall have a separate lot, unless a special permit be granted in each case by the Commissioners of this District, is not a building regulation within the meaning of the act of Congress, authorizing the Commissioners to make and enforce building regulations; and the Commissioners have no right to refuse to issue to the owner of a lot thirty-two feet wide and forty-six feet and four inches deep, a permit to erect two houses thereon, where their refusal is based solely upon that provision of the building regulations and upon section 6 of their rules, regulating the subdivision of lots, which section provides that lots may only be subdivided into lots not less than sixteen feet wide and fifty feet deep.
2. Where the proposed buildings of an applicant for such a permit conform in respect of materials, safety, and healthfulness to the building regulations proper, it is the duty of the Commissioners to issue the permit upon the payment of the lawful fees, and the act required of them, being a purely ministerial one, can be enforced by the writ of *mandamus*; following *Roberts v. Valentine*, 13 App. D. C. 38.

No. 1100. Submitted October 3, 1901. Decided November 5, 1901.

HEARING on an appeal by the respondents, the Commissioners and the building inspector of the District of Columbia, from a judgment of the Supreme Court of the District of Columbia, directing a peremptory writ of *mandamus* to issue to them requiring them to grant a permit to the relator to erect certain dwelling-houses on land owned by him. *Affirmed*.

The COURT in its opinion stated the case as follows:

This is an appeal from a judgment of the Supreme Court of the District of Columbia ordering a peremptory writ of

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Statement of the Case.

~~mandamus to issue to the Commissioners, and to John B. Brady, building inspector of the District, compelling the grant of permission to the relator, Frederick J. Miller, to build upon certain lots in the city of Washington according to a plan presented by him.~~

The petition filed by the United States on the relation of Frederick J. Miller alleges the following facts:

1. Relator is a citizen of the United States, residing in the District, and since October 4, 1900, has been the owner in fee-simple of certain land in the city of Washington, known as part of original lot 1 in square numbered 950. The said part of lot has a front of thirty-two feet on Tenth street, and a depth of forty-six feet and four inches; and is unimproved.

2. Relator proposed to erect on said land two two-story and basement brick dwellings with six rooms each; each house was planned to front sixteen feet on Tenth street and extend back thirty-six feet, thus covering the entire frontage and leaving an open space in the rear of ten feet and four inches, which is wider than that required by the building regulations of the District Commissioners.

3. The plans and specifications for said houses were prepared by an architect and conformed, in respect of materials, safety, etc., to the requirements of the said building regulations and the suggestions of the inspector.

4. Application was then formally made to said inspector as required for the necessary permission to commence building; but this was refused, "not because of any want of conformity of said plans and specifications to the building regulations in the matter of materials, workmanship, and provisions for the safety of the public, and the health of the persons who might inhabit said houses when completed, but because said land was not subdivided as required by the provisions of the building regulations, relating thereto."

5. Section 34 of the building regulations declares that "no dwelling-house less than sixteen feet wide shall be erected; provided, however, that any existing lot that is

not less than twelve feet wide, and which is a part of a duly recorded subdivision, may have a dwelling erected thereon the full width of the lot. Blocks of two or more dwelling-houses shall not be erected until the land upon which they are to be erected has been subdivided, so that each house shall have a separate lot, unless special permit be granted in each case by the Commissioners."

A fee is provided for each "permit," and a penalty for failing to obtain the same before building.

6. Pursuant to authority of an act of Congress, the Commissioners had also promulgated rules regulating the subdivision and record of subdivisions of lots. Under these, plats were to be certified and filed in a certain manner, and section 6 of the same, provides that lots may only be subdivided into lots not less than sixteen feet wide and fifty feet deep. Certain exceptions are permitted, which are not material here.

7. Relator applied to the District surveyor, with tender of fees, etc., as required, to make and certify a plat for record dividing his subplot of thirty-two feet by forty-six feet and four inches, into two lots each with sixteen feet frontage on Tenth street.

This was refused, and upon application to the Commissioners they declined to order the same done.

8. The Commissioners refuse to allow the building permit, "because the said proposed lots are not of the required depth of fifty feet, and for no other reason."

9. "Relator further avers that the depth of fifty feet required for each lot, before a permit to erect a building shall under any circumstances be granted, is not necessary to health and safety in the construction of dwellings, but is an arbitrary and unnecessary requirement." And further, that prior to the promulgation of the regulations, many such buildings had been erected and are "still standing and occupied, and are safe and healthful habitations."

10. Averring tender of the lawful fees, and renewing the offer to pay the same, the prayer is for a judgment commanding the issue of said permit, etc.

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The return of the Commissioners to the preliminary order to show cause, (1) admits the substantial allegations of the petition, and bases their refusal upon the provisions of the acts of Congress relating to buildings and to subdivisions of lots, and the regulations made in accordance therewith.

(2) They admit that so long as the adjacent lots remain unimproved, the proposed houses "may be safe and healthy for the inmates thereof," but aver that in their judgment, when the adjacent lots are improved, the buildings proposed by relator "may become unhealthy and the public health and safety thereby become endangered."

And they further say that "while they admit that the health of the inmates will be substantially provided for, so far as said houses themselves are concerned, and so long as the adjacent land remains unimproved, they say that, in their opinion, when the adjacent property is improved, as they aver it is likely to be, the relator's houses, in combination with such adjacent improvements, are likely to produce a situation injurious to the public health and safety."

They also admit "that the exact depth of fifty feet for each lot is not essential under all circumstances to the public health and safety, but aver that some limitation of the depth of lots upon which buildings may be erected is essential to such health and safety; and that in the exercise of their best discretion, which they are advised has been committed to them by the law, they determined that fifty feet is the smallest depth that should be permitted for such purposes."

(3) They further allege that if the buildings be permitted, it will be possible for owners of lots to form irregular combinations, facing in different directions, thus requiring undue extension of water and sewer service, etc. A sketch is attached showing a possible combination of buildings of irregular size, limiting the air and light in rear of each house to the space left by the particular owner. It is not claimed, however, that the buildings proposed by the relator will require any undue extension of water and sewer service, etc.

(4) The relator moved the grant of the peremptory writ, notwithstanding the answer to the rule, and the same was sustained and final judgment entered. [From that judgment the respondents appealed.—REPORTER.]

Mr. Andrew B. Duvall, attorney for the District of Columbia, and *Mr. Clarence A. Brandenburg*, assistant attorney, for the appellants:

1. The regulations in question are within the exercise of the police power; they regulate for public purposes the proper use of land in connection with buildings to be erected thereon, and the land of others upon which buildings may be erected. *Prentice Police Powers*, 236; *Powell v. Pennsylvania*, 127 U. S. 678; *Thorpe v. Rutland & B. RR.*, 27 Vt. 140; *Com. v. Alger*, 7 Cush. 84; *Mayor, etc., of N. Y. v. Miln*, 11 Pet. 139; *Hannibal, etc., RR. Co. v. Husen*, 95 U. S. 465; *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 192; *Munn v. Illinois*, 94 U. S. 124; *Bepley v. State*, 4 Ind. 264; *Goddard v. Jacksonville*, 15 Ill. 588; *Soon Hing v. Crowley*, 113 U. S. 703; *B. & P. RR. Co. v. Fifth Baptist Church*, 108 U. S. 317; *Mugler v. State of Kansas*, 123 U. S. 623; *Railroad Co. v. District of Columbia*, 10 App. D. C. 126.

2. The Commissioners had ample authority to make the regulations complained of. Act of Congress of June 14, 1878, 20 Stat. 131; Act of Congress of August 27, 1888, 25 Stat. 451; Joint Resolution of Congress of February 26, 1892, 27 Stat. 394. The building regulations have been held to have the same effect as if enacted by Congress. *United States v. Cole*, 18 D. C. 504; *Halpine v. Barr*, 21 D. C. 331. The mere authority to make "building regulations" relates not alone to the materials of which the structure is to be erected. *United States ex rel. Strasburger v. Commissioners*, 5 Mack. 389. It is an established principle in this country that so long as the legislature does not pass the limits fixed by the Constitution, the courts have no

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Argument of Counsel.

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authority to interfere on the ground that the legislative acts in question violate the natural principles of justice and right. *Tiedeman's Lim. Police Power*, Sec. 2. A "building regulation" is not void because it may be considered unreasonable. It has been repeatedly held that an act of Congress is not unconstitutional and void merely because it is unreasonable; and if that be true an ordinance promulgated by the Commissioners, which Congress declares shall have the force and effect as if enacted by Congress, should not be held void even if it be unreasonable. This test of the validity of a municipal regulation cannot be applied when the power to legislate on the subject has been expressly conferred. *District of Columbia v. Waggaman*, 4 Mackey, 335.

3. The regulations complained of are not arbitrary requirements; they are bona-fide efforts to conserve the public health and to protect the rights of the public. *Commonwealth v. Tewksbury*, 11 Metc. 55; *Taylor v. State*, 35 Wis. 298; *Blydenburgh v. Miles*, 39 Conn. 484; *Watertown v. Mayo*, 109 Mass. 315.

4. The regulations are not void because of uncertainty. It was claimed by appellee that, under the authority of *United States v. Colc*, 18 D. C. 516, the regulations respecting the subdivision of lots were void, because of the "exceptions" contained therein. But we submit that the requirements of the regulations are severable; that part relating to the appellee's lot is unobjectionable, and it is therefore enforceable. The rule is settled that in a statute which contains invalid or unconstitutional provisions, if the valid and invalid are capable of separation, only the latter are to be disregarded. *Albany Co. v. Stanley*, 105 U. S. 305; *Keokuk P. Co. v. Keokuk*, 95 U. S. 80; *Pressner v. Illinois*, 116 U. S. 252.

5. The writ of mandamus does not lie in such a case as this against the appellants. The duty of the Commissioners and the inspector of buildings in such a case as the one at

bar is not a mere ministerial duty; it necessarily involves the construction of statutes and the exercise of judgment. *Messenger Co. v. Wright*, 15 App. D. C. 468.

Mr. B. F. Leighton for the appellee:

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1. The Commissioners have no power to issue building regulations except such as is derived from the act of Congress which authorized the Commissioners of the District of Columbia to make such building regulations for said District as they might deem advisable. 1st Supp. R. S. U. S., p. 352. While the language of the act is broad and general in its terms, and confers upon the Commissioners ample authority to promulgate and enforce building regulations, the act does not confer upon them any authority to promulgate a regulation which does not legitimately and properly fall within the designation of a building regulation. To regulate the construction of a building is to prescribe the mode of its construction; of what it shall be built; the character of the material, thickness and strength of the walls, the adjustment and proper connection of the sewer and water pipes, and possibly, the size and ventilation of the rooms. It has nothing to do with the subdividing of the land upon which the building is to be erected, and even the power to make such regulations is limited by the rule that a building regulation to be valid must be reasonable. This principle of reasonableness must be applied to the application of the act of Congress, and the statute interpreted by its light.

The doctrine of reasonableness as applied to a building regulation is a proper test of its validity. *Milliken v. City Council*, 54 Tex. 394; *Borling v. West et al.*, 29 Wis. 315; *Yates v. Milwaukee*, 10 Wall. 504; *Buffalo v. Webster*, 10 Wend. 99 (Lawyer's Co-op. Ed.); *Dunham & Daniels v. Trustees of the Village of Rochester*, 5 Cow. 465; *Tugman v. City of Chicago*, 78 Ill. 405. That portion of section 34 of the building regulations which directs that blocks of two or more dwelling-houses shall not be erected until the land upon which they are to be erected has been subdivided, so

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Argument of Counsel.

that each house shall have a separate lot, unless a special permit be granted in each case by the Commissioners, makes by necessary implication, the orders promulgated by the Commissioners under the act to regulate subdivisions of land within the District of Columbia, a part of the building regulations themselves, as much as though incorporated therein. Such provision has no relation to the subject of building, is not within the meaning or purpose of the act empowering the Commissioners to make building regulations, is *ultra vires*, and for that reason void. It is not properly a regulation at all. The Commissioners have reserved expressly the right to grant a special permit in violation of the requirement if they see fit. It seems to imply that each case is to be considered by the Commissioners by itself, and a permit granted or withheld, at their pleasure. The statute gives them no such power. *United States v. Cole*, 18 D. C. 516.

2. The value of property consists in the uses to which it can be put. Take away all uses to which property may be devoted, and you destroy the value of the property as effectually as though the property itself was made non-existent. The highest use to which property can be devoted is that of the home. A dwelling-house used as a place of residence cannot be, under any circumstances, injurious to property in its vicinity, or the subject of abatement as a nuisance. A building for such a purpose may be erected next door to a saloon, a theater, a soap factory, or a limekiln, in the heart of the business portion of the city or town, and no question could be raised as to the legality of such structure because of the use to which it was to be put. Such places might readily become injurious to the home, and hence, in the interests of the home, ordinances are found in many cities restraining, except under certain conditions, the use of property for the purposes indicated and other kindred objects; but no municipal ordinance can be found which prohibits the erection of a building for a home, on the ground that it is injurious to the community in which it is to be erected. No such restriction of the use of property as is sought to be here imposed, can be found anywhere in the books. The Commissioners admit, in their return, that the houses if

erected as planned, will be commodious, sanitary and suitable for human habitation. One of the grounds of their refusal to grant the permit is based upon the alleged fear that at some future time, it may be possible, if these dwellings are surrounded by other dwellings, they may become unsanitary. It will be time enough to deal with the future condition of the houses when that future shall arrive. It would hardly do to deprive a citizen of the legitimate use of his property, in fear of the fulfillment of a prophecy which may never come to pass. See *Austin v. Murray*, 16 Pick. 126; *Hayes v. Appleton*, 24 Wis. 542; *Hayden v. Noyes*, 5 Conn. 391; *Milliken v. City Council*, 54 Tex. 394; *Dunham v. Trustees, etc.*, 5 Cow. 459; *Staley v. Mott*, 61 Md. 303; *Tiedeman, Limitation of Police Powers*, Sec. 122 E.; *Wadleigh v. Gilman*, 12 Me. 406; *Vanderbilt v. Adams*, 5 Cow. 351.

Mr. Justice SHEPARD delivered the opinion of the Court:

In the exercise of its ordinary legislative power over the District of Columbia, Congress, on June 14, 1878, authorized and directed the Commissioners to make and enforce such building regulations as they may deem advisable, and declared that the same should have the same force and effect as if enacted by Congress. 20 Stat. 131.

The latest regulations under this authority were promulgated on July 31, 1897, and contain many necessary and useful requirements looking to the safety, health, etc., of the occupants of the buildings and of the general public.

Among these is included the one heretofore set out which limits the depth of lots, upon which dwellings may be erected, to not less than fifty feet. The only limitation upon the size of a dwelling to be erected upon any lot is that it shall be not less than sixteen feet wide, and that it shall have certain open space in its rear for light and air. The houses which relator proposes to erect are of the prescribed width, and as they extend back but thirty-six feet, a sufficient open space is left to comply with the regulations.

The single question involved in this case, therefore, is the validity of the particular item of the regulations by virtue

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of which the relator has been denied permission to build his houses as proposed, because his lots have not the required depth of fifty feet.

The discussion of this question at the bar has taken a wide range in respect of the powers of the municipal authorities in the matter of regulating and supervising the erection of buildings by private owners, which we do not deem it necessary to follow, as the ground upon which our conclusion rests is embraced within much narrower limits. In our opinion this particular requirement cannot properly be considered a building regulation within the powers conferred by Congress to that end in the act before referred to.

It does not relate to the height, depth, material, or manner of construction of the building itself; nor does it have any relation to leaving open necessary air spaces at the rear of buildings, or to the erection of dwellings fronting upon such air spaces, or alleys only; these are otherwise provided for. That owners of squares and parts of squares may possibly redivide or subdivide the same into lots of irregular depths, so that a later building upon one might shut off outer surface communication with the air space reserved in the rear of an adjacent house, and thereby possibly affect the public health or safety in some remote degree, does not seem to us a reasonable ground for bringing a rule for its prevention within the scope of a building regulation.

Moreover the same result might be achieved even if none of the lots were to be made of less depth than fifty feet.

To provide, in some measure, for such contingencies, Congress has legislated respecting the subdivision of lands and lots and the records of the plats thereof. By act of August 27, 1888, the Commissioners were "authorized and directed to make and publish such general orders as may be necessary to regulate the platting and subdividing of all lands and grounds in the District of Columbia," and further provided that no such plat or subdivision shall be admitted to record in the office of the Surveyor, without an order from the Commissioners. Other provisions look to the dedication of avenues, streets and alleys, and the conformity, in all cases

outside the city limits, with the general plan of the city of Washington. 25 Stat. 451.

In obedience to this act, the Commissioners promulgated regulations concerning the subject-matter, among which is to be found section 6, heretofore referred to, requiring all lots of the subdivision to be not less than sixteen feet wide and fifty feet deep, to admit the plat to record. No penalty is provided for failure to obey the regulations beyond the denial of record.

In a case heretofore decided, where a party sought to compel the Commissioners to admit a plat to record that was not in compliance with the requirements of the regulations, it was said that: "Each owner has the undoubted right to lay off his land in any manner that he pleases, or not to subdivide it at all. * * * But he has no corresponding right to have his plat of subdivision admitted to the records." *Ross v. United States ex rel. Goodfellow*, 7 App. D. C. 1, 10.

In accordance with that decision, the Commissioners were justified in refusing to admit the relator's plat of his subdivision to record, and the judgment appealed from does not compel them to do so. But the refusal of permission to the relator to build upon his lots as proposed is the denial of a right of property. It is admitted that his proposed buildings conformed in respect of materials, safety and healthfulness to the building regulations proper, and that permission would have issued as a matter of course had the lots been of the depth of fifty feet. As that regulation is not within the power conferred to make building regulations, and cannot constitute a defense under the act regulating the subdivision of lots, it is the plain duty of the Commissioners to issue the permit upon the payment of the lawful fees which the relator is ready and willing to do. The act required of them being a purely ministerial one, can be enforced by the writ of *mandamus*. *Roberts, Treasurer, v. United States ex rel. Valentine*, 13 App. D. C. 38, 46; s. c., 176 U. S. 221, 231.

It follows that there is no error in the judgment and it will be affirmed. It is so ordered. *Affirmed.*

D. C.]

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COLUMBIA PH

PATENTS; LICENSES; CONTRA
RE

1. The transfer of a patent
prior licensee.
2. A contract whereby the
ents grants to another
to the public at specific
property in the instrum
in itself as seeking to
a qualified ownership in
rights of possession, no
in seeking to restrain
ented article.
3. Where the licensee of a
phone patents, having
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a third party who has
fringing upon his right
that the licensee sells
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appropriate proceedings.
4. Where on an appeal from
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tion was made before
that the complainant in
the restraining order,
power exercised by the
case.

No. 1006. Submitted O

HEARING on an appe
an interlocutory order

of Columbia, granting a temporary restraining order. *Affirmed.*

The COURT in its opinion stated the case as follows:

This is an appeal by John E. Whitson and Walter J. Whitson from an interlocutory order of the Supreme Court of the District of Columbia, whereby, in a suit in equity instituted by the appellee, the Columbia Phonograph Company, as complainant against the appellants and a corporation of the State of New Jersey known as the National Phonograph Company, as defendants, an injunction *pendente lite* was allowed to restrain said defendants from selling or dealing in phonographs or phonograph supplies in the District of Columbia.

From the record, which consists only of the bill of complaint, the exhibits thereto, some affidavits in support of the bill, and affidavits on behalf of the appellants, it appears that the Columbia Phonograph Company, a corporation under the laws of the State of West Virginia but having its general office and doing business in this District, was organized for the purpose of exploiting and placing upon the market the talking machine known as the graphophone, protected by letters-patent of the United States issued in the year 1886, to Bell and Tainter; and that the National Phonograph Company, above mentioned, was organized in the State of New Jersey, and under the laws of that State, for the purpose of exploiting and placing upon the market a similar talking machine known as the phonograph, the invention of Thomas A. Edison, to whom letters-patent of the United States for it and for its improvements were issued in the year 1888 and subsequent years. The two inventions, although patentably different, were of the same general character and subserved the same purpose, the reproduction of the sounds of the human voice; and, as was natural, litigation followed between their respective owners. Ultimately, however, an agreement was reached between them; and it is the alleged violation of that agreement that has given rise to the present suit.

D. C.]

Statement of the Case.

The facts that led up to this controversy, so far as they can be gathered from the record before us and are necessary to be here stated, are these:

For the purpose of bringing the inventions of Mr. Edison into use two companies were organized in the State of New Jersey, the place of his residence, one designated as the Edison Phonograph Company, which by contract with Edison became the owner of the patents and was entitled to become the owner of any other inventions in the same line that might be made by him, and the other designated as the Edison Phonograph Works, which acquired from Edison the exclusive right of manufacturing the phonographs. Edison was the owner of all but a comparatively small fraction of the stock of the Edison Phonograph Company; and he also controlled the other company, the Edison Phonograph Works. Being so situated, he entered into a contract on June 28, 1888, with one Jesse H. Lippincott of New York, whereby he agreed to sell to Lippincott, and Lippincott agreed to buy from Edison the entire capital stock of the Edison Phonograph Company, except 150 shares, which had already been transferred by Edison to another person, but for the repurchase of which there was provision made in the contract, so as to give Lippincott the entire and absolute ownership. The consideration for the transfer was the payment by Lippincott to Edison of the sum of \$500,000, in four several installments of different amounts, all within the same year 1888, and the organization by Lippincott of a new company or corporation to be designated as the American Phonograph Company, whose business it should be to exploit the phonograph and to introduce it into commercial use. And provision was made for the execution of contracts between such company, when organized, on the one hand, and Edison and the Edison Phonograph Works, on the other hand.

Before August 1, 1888, the contemplated company was organized by Lippincott, also in the State of New Jersey, although under a slightly different name, the North American Phonograph Company; and on the said last-mentioned day

Edison entered into the contract with it and with Lippincott required by the preceding agreement. Lippincott, it seems, had acquired control also of the graphophone; and by the agreement of August 1, 1888, it was provided that Lippincott and the North American Phonograph Company, of which he became president, should do their utmost to introduce into commercial use both the phonograph and the graphophone impartially; that the two instruments should be kept separate; that Edison would assign to the company any improvement upon the phonograph that might be made by him at any time within fifteen years thereafter; and that the field of operations of the company should comprise the United States and Canada, but not any other countries. And it was added that the contract was based on the assumption that the agreement of June 28, 1888, between Edison and Lippincott had been or would be carried out.

With these agreements in force, the North American Phonograph Company, now owning or controlling both the phonograph and the graphophone, entered into a contract on January 15, A. D. 1889, with Edward D. Easton, of this City and District, whereby it was provided that, in consideration of the payment of \$25,000 and other valuable considerations by Easton, this latter should for the term of five years thereafter, have the exclusive right to lease the phonograph and the graphophone, and their respective appurtenances, and to let the same to others, for the whole territory comprised within the States of Delaware, Maryland and the District of Columbia; that the company should not grant to others or itself exercise any similar rights during such term within said territory; that the phonographs and graphophones to be dealt in should remain the property of the company, and should only be rented to and by Easton at certain specified rates; that if, by January 1, 1890, or at any time thereafter, the system of merely leasing instruments to the public should be found by the North American Graphophone Company to be unsatisfactory, it might require Easton to give to the public the option of either leasing or purchasing them at stipulated prices; and that, within

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Statement of the Case.

six months after the date of the agreement, Easton should organize a company under the laws of the State of West Virginia, with a capital stock of \$125,000, to which his interest under the contract should be assigned, and which should perform the contract. It was further provided by this contract that the company so to be organized should, immediately upon its organization, deposit with a trust company in New York, for delivery to the North American Phonograph Company, or to Jesse H. Lippincott, trustee, 5,000 shares of its capital stock, full paid, of the par value of \$25,000; and that upon such deposit, the license and privilege granted to Easton and to inure to the benefit of the company to be organized by him, should be extended to March 26, 1903, and for such further time as might be authorized.

In pursuance of this contract, Easton organized the Columbia Phonograph Company, the complainant in the suit, and the appellee before us; and the North American Phonograph Company thereupon entered into contract directly with it, and confirmed to it its agreement with Easton, and the exclusive rights and privileges conceded to him. It is understood that the deposit of stock required to be made by the Columbia Phonograph Company was duly made, and that the extension of its exclusive right and privilege under the contract thereupon became effective until March 23, 1903.

In the summer of 1894, after the extended term had been entered upon, the North American Phonograph Company became insolvent; its affairs went into the hands of a receiver; and its assets were disposed of under direction of the Court of Chancery in New Jersey. Whether the company itself was formally dissolved, does not appear; but presumably it is defunct.

The National Phonograph Company, a corporation organized under the laws of New Jersey, and having its principal place of business at Orange, in that State, is alleged in the bill of complaint to be the "successor of the North American Phonograph Company in the phonograph business," and to be "bound by the contracts and agreements of the latter";

and it is alleged also in the bill that "it is the sole and exclusive selling agent for all phonographs and phonograph supplies manufactured in accordance with the said Edison phonograph inventions and under the said Edison phonograph patents"; and that it "does not sell its said phonographs outright, but in connection with a license agreement under which it retains a certain control of the same." On the other hand, it is averred by an officer of this company, who makes an affidavit in this case on behalf of Whitson Brothers, that the company, which was incorporated on January 26, 1896, and which purchased some of the assets of the North American Phonograph Company, but not, as it claims, any rights of the North American Phonograph Company in the contracts made by that company with Easton and the Columbia Phonograph Company, is not the successor of the North American Phonograph Company, and is engaged in the business of selling phonographs and graphophones under license from the Edison Phonograph Company and the American Graphophone Company respectively. In this affidavit it is further stated that the National Phonograph Company has sold phonographic goods to the Columbia Phonograph Company, as well as to Whitson Brothers, and others. And the Whitson Brothers, the appellants here, in an affidavit filed by one of them, admit that they are dealers in phonographs and phonographic supplies in the District, and that their purchases are made from the National Phonograph Company at Orange, in New Jersey, whence their goods are shipped to this city by the company. From the affidavits on behalf of the defendants it also appears that the Columbia Phonograph Company has practically ceased to deal in phonographs, and confines itself to the traffic in graphophones and materials connected therewith; and the inference is that the controversy is the outcome of rivalry and antagonism between the owners of the rival patents.

In this condition of things the Columbia Phonograph Company, on April 22, 1901, filed its bill in equity in the Supreme Court of the District against the appellants, John E. Whitson and Walter J. Whitson, and the National Phonograph Company, as defendants, for an injunction to restrain

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Statement of the Case.

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them, and each of them, and their agents, "from directly or indirectly using or causing to be used, or selling or causing to be sold, or letting or causing to be leased, or offering or causing to be offered for sale or to let within the States of Maryland and Delaware and within the District of Columbia any phonograph or phonograph supplies." Only the Whitsons were served with process; the National Phonograph Company was not served, and has not entered an appearance in the cause; but one of the affidavits filed on behalf of the Whitsons was made by the assistant general manager of the company, who fully and clearly states in it the position of the company in the controversy.

Upon the filing of the bill of complaint, which was supported by affidavits, motion was made for an injunction *pendente lite*; and the motion was opposed on behalf of the Whitsons, who filed affidavits in opposition thereto. The court below, however, upon consideration of the motion, granted the injunction *pendente lite*; and from its order of allowance of the injunction the present appeal has been prosecuted by the Whitsons.

It may be added that this is not the first occasion on which the Columbia Phonograph Company has deemed its rights in this District under the contract with the North American Phonograph Company to have been violated, and has had recourse to legal proceedings to restrain such violation. In 1893, as appears from the record while the North American Phonograph Company was yet in active existence, one Tewksbury and one Spencer, claiming to act under the authority of that company, undertook to procure the manufacture of sound records within the District of Columbia in disregard of the rights of the Columbia Phonograph Company, and were restrained by injunction from so doing.

Mr. S. R. Church and Mr. Howard W. Hayes for the appellants.

Mr. Philip Mauro for the appellee.

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Mr. Justice MORRIS delivered the opinion of the Court:

Section 4898 of the Revised Statutes of the United States being section 36 of the Patent Act of July 8, 1870, provides that "every patent or any interest therein shall be assignable in law by an instrument in writing; and the patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under his patent to the whole or any specified part of the United States." And it adds: "An assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the patent office within three months after the date thereof."

Under this provision of the statute, the North American Phonograph Company, which at the time had full and complete control over the Edison Phonograph patents, gave to the appellee, the Columbia Phonograph Company, for a term of years which has not yet expired, the exclusive right to deal in phonographs and phonograph supplies in this District, as well as in the States of Maryland and Delaware; and, if its contract in the premises for that purpose be not in itself invalid, there is no good reason shown why it should not be regarded as yet in force and effect. It can make no difference in this regard that the North American Phonograph Company became insolvent, and is extinct or moribund, or has passed into innocuous desuetude, and that its assets have gone into other hands. Nor is it of any consequence whether the National Phonograph Company is, or is not, to be regarded as the successor in law, if such it can be, of the North American Phonograph Company. Any person, natural or artificial, into whose hands, after the execution of the contract between the North American Company and the Columbia Company, the control of the Edison patents came, with knowledge or notice, actual or constructive, of the existence of such contract and of the rights of the Columbia, must be assumed to have taken subject to such rights, and to be disqualified from infringing in any manner the exclusive license given to the Columbia Company. If this were not so, it is

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As the case now stands
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on the part of the defendants, and in the absence also of testimony which might materially enlighten the case, we do not deem it expedient to go at all into its merits. It is sufficient for us now to say that, in our opinion, the appellant, as complainant in the court below, has stated a cause which entitles it to a temporary injunction; and that, therefore, there was no error in the action of the court which awarded such injunction.

The order allowing the injunction *pendente lite* will be affirmed, with costs; and the cause will be remanded for further proceedings therein according to law. And it is so ordered.

DISTRICT OF COLUMBIA

v.

BAKERSMITH.

PRACTICE; RULE FOR INSPECTION OF PUBLIC PAPERS AND RECORDS.

1. The plaintiff in an action against a municipal corporation has the right to inspect such public records and documents as are in the possession of the defendant and which are pertinent and material to the trial of the issue; but a peremptory order on the defendant in such a case passed by the trial court on motion of the plaintiff, after notice to the defendant, requiring the defendant in its corporate capacity to exhibit certain records and documents to the inspection of the plaintiff at certain times and at certain places is improperly granted.
2. The proper practice, under such circumstances, is for the plaintiff, upon his being refused the right to inspect, to apply by a motion, designating the particular record and document he desires to inspect, for a rule upon the official or agent of the defendant having custody of the same, to show cause why such inspection should not be allowed. If, upon the return, the rule be made absolute and be disobeyed, the right may be enforced by attachment.
3. The act of Congress of May 13, 1892 (27 Stat. 38), providing that all public records which have any reference or in any way relate

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Statement of the Case.

to real or personal property in the District of Columbia shall be open to the public for inspection free of charge, incorporated as it is in a tax law, would seem to be in the interest and for the protection of taxpayers, and not, of itself, to give the right to a plaintiff in an action against the District of Columbia to inspect public records and documents in the possession of the defendant.

No. 1117. Submitted October 4, 1901. Decided November 5, 1901.

HEARING on an appeal (specially allowed) from an order of the Supreme Court of the District of Columbia requiring the defendant, the District of Columbia, in an action to recover damages for personal injuries, to allow the plaintiff or her attorneys to inspect certain public documents or records in its possession. *Reversed.*

The COURT in its opinion stated the case as follows:

This is a special appeal allowed from an order of the court below giving the plaintiff in the action, Rosina Baker-smith, the right to inspect the records, documents, and papers of the defendant, the municipal corporation of the District of Columbia.

The action on which the order was made was instituted to recover for personal injury suffered by the plaintiff, caused, as alleged, by the negligence of the defendant, or its agents and servants. After issue was joined on the plea of not guilty, there was a motion made by the plaintiff that the defendant be required to exhibit for the inspection of the plaintiff and her attorneys, at such times and under such conditions as the court should deem proper, all records, documents, reports and papers in the possession or control of the defendant, containing information relative to the construction, repair and condition of a certain culvert, drain, trench or sewer, described in the pleadings in the cause, to-wit: A certain culvert, drain, trench or sewer on Brightwood avenue between Richmond and Quincy streets, etc.; it being alleged that an inspection of the same was essential to the ends of justice and a fair trial of said cause. Notice merely of this motion was given counsel for the defendant that the same would be called to the attention of the court the second day after it was filed. In support of the motion was filed

an affidavit made by plaintiff's counsel, in which it is stated, "that the defendant has in its possession certain records, books, documents, reports and papers containing evidence pertinent and material to the plaintiff's case, consisting of orders for and reports upon the construction, repair and condition of a certain culvert, drain, trench or sewer described in the pleadings, etc. That, in the opinion of the deponent, it is unsafe and unadvisable for the plaintiff to present her cause without such inspection of said records in the possession of the defendant: That the information sought is exclusively in the possession and custody of the defendant: That the plaintiff through her attorney has applied to the defendant, its servants and attorneys for the information herein sought, and the same has been refused, and that the plaintiff has no means of obtaining the information desired except by such means as the court may provide."

Upon this motion only, thus supported by the affidavit just recited, the court passed a peremptory order on the defendant in its corporate capacity requiring it to exhibit to the inspection of the plaintiff or her attorneys at the office of the sewer department of the District, between the hours of 9 and 12 o'clock A. M., each day during the week beginning September 1, 1901, or so much of said time as may be necessary for the plaintiff or her attorney to complete an inspection of the herein described records or papers, the records or official papers in the possession or custody of the defendant, to-wit: Any and all orders and plans for the construction or repair of a certain culvert, drain or sewer constructed by the defendant, or by its orders, across Brightwood avenue, between Richmond and Quincy streets, etc., made or given by the defendant, or officials or employees of the government of the District, prior to January 15, 1900, and any and all official books and documents relative to said construction and repair, or material used, or to be used, in or as means adopted for doing said work; and also any and all official reports and documents relative to the condition of said culvert, etc., or any part thereof, or relative to any work done thereon by order of the authorities of the

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Argument of Counsel.

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government of the District, or officials or employees of said government, before the 15th of January, 1900.

It is from this order that the special appeal was allowed; and the first question is, whether the order was such as, under the circumstances, should have been passed?

Mr. Andrew B. Duvall, attorney for the District of Columbia, and *Mr. Clarence A. Brandenburg*, assistant attorney for the appellants:

1. Appellant has the right to decline to produce or allow the inspection of documents injurious to public interests; it is contrary to public policy to require such production or inspection. It is laid down by the authorities as a well-established principle of law that official transactions between the heads of the departments of the government and their subordinate officers are in general treated as secrets of State, and that, therefore, executive officers are not bound to produce papers or disclose information communicated to them, or in their possession, whenever, in their judgment, public considerations make it inexpedient. Appeal of *Hartranft et al.*, 85 Pa. St. 433; *Worthington v. Scribner*, 109 Mass. 487; *Totten v. United States*, 92 U. S. 105; *Bradley v. McIntosh*, 5 Ont. Rep. 227.

2. Determination of expediency to produce municipal records rests with the Commissioners. *Thompson v. German Valley RR. Co.*, 22 N. J. Eq. 111; Appeal of *Hartranft*, 85 Pa. St. 433, 449.

3. There is absolutely nothing in the petition for the inspection showing such interest as would entitle the appellee to such inspection, even if it were not detrimental to public interest or public policy. *Brewer v. Watson*, 61 Ala. 310; 76 id. 49. Nor is there in said petition any specification of any document or report in the appellant's custody.

Mr. Charles H. Merrillat and *Mr. Charles F. Carusi* for the appellee:

1. The records sought to be examined are public records. Some authorities hold that at common law there is a right of

inspection in the public of such records irrespective of any special interest therein. *People v. Cornell*, 47 Bard (N. Y.) 329. All agree that the slightest interest in the records is sufficient. Appellee's interest appears from her declaration. 14 Ency. of Law (1st ed.), 171; Dill. on Mun. Corp. (4th ed.) Sec. 303; Grant on Corp. 311; *State v. Williams*, 41 N. J. L. 332-336; *Diamond Match Co. v. Powers*, 51 Mich. 145; *People v. Walker*, 9 Mich. 328; *People v. Mott*, 1 How. Pr. 247; *Cockburn v. Bank*, 13 La. Ann. 289.

2. Appellee's right of inspection is because she has an interest in the municipal records. Whether that interest rests in tort or contract is immaterial. The municipal corporation and its agents have or should have no wish to injure one of its corporators by suppressing evidence that would establish the fact that the municipality owed her compensation for damage caused her by it or its servants. The contention made in appellant's brief that cases such as this come under the doctrine of State secrets as to which public officials are vested with absolute authority to give or withhold information is absurd. No such autocracy has any place in our form of government. Carried to its logical conclusion public officers would be czars and public records but private personal memorials. The cases cited by appellant may be apropos of State secrets, but have no reference to the pending appeal. Moreover, the Commissioners of the District have nowhere in the record claimed the documents sought contained State secrets or matters affecting public policy. Payment of a few hundreds or thousand dollars on account of personal injuries caused by a defective highway does not involve public policy.

3. The act of Congress of May 13, 1892, opened the records sought to be inspected to the fullest extent. It provides: "And it is hereby declared that all public records which have any reference or in any way relate to real or personal property in said District shall be open to the public for inspection free of charge." This statute was not designed to limit the old common-law right of inspection, but to meet a specific evil arising out of efforts of authorities to conceal certain things for their own purposes. It is broad, plain, and

unambiguous. The pursued has nothing to wish. The order made by the court is in accordance with its terms. The records are the property in the District and those appellee seeks to introduce into evidence in mind in passing the law assessments on account

4. The grant of the order is framed in app to public records which trial. It is as specific as that all access is denied enable the order to be documents more particular is that in such orders their subject-matter, and as is practicable consider *United States v. Babco Co. v. Bancroft Co.*, 98 2 Burr's Trials; *Vasse Jones v. Parker*, 20 N. *McKnight*, 1 Car. & Rod.

Moreover, appellant the motion, since it neither was unable to know with to any specific part of towards making a bet respect it owed a duty a plea in abatement.

5. The course taken suit being pending its motion in the cause in instead of proceeding (1st ed.), 171; Dill. Tidd's Pr. 595; *Pearson v. Vail*, 2 Cow. 623-625 S.) 23.

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Mr. Chief Justice ALVEY delivered the opinion of the court.

There is no doubt of the right, under proper circumstances, and conditions, of the plaintiff in an action against a municipal corporation, to inspect such records, documents and papers as may be of a public nature, and which may be pertinent and material to the trial of the issue involved in the cause. Such records and documents are public, and should be open to the inspection of every one who has an interest in them. The custodians of such records and documents are charged with the duty of their safe preservation, and are liable for any want of care in their safekeeping. It is not the right of any and every one to have surrendered to him the use and control of such records and documents whenever demanded. The public right is paramount to that of any individual right, and the public right must be preserved, though always with proper respect to the individual right. The latter right must, therefore, be exercised under proper conditions and restrictions, always with a view, however, to the general public right and protection, in the preservation of the corporate records and documents.

In this aspect of the case, and having due regard to the public rights in the matter, the question is, whether the court was right in passing the peremptory order upon the motion of the plaintiff, without a rule upon the defendants to show cause against such application by answer. This was certainly contrary to the established practice upon the subject. Mr. Dillon, in his work on Municipal Corporations, Sec. 303, says: "When the corporator's application to inspect is founded on his general right he has a *mandamus*, but when it is founded on a suit pending, he obtains a *rule*. In an action by one corporation against another, rules were made absolute for each corporation to inspect so much of the books and records as related to the subject-matter in dispute. The *motion for the rule to inspect* and to have copies should be supported by affidavits showing the foundation of the claim, the application, the proper officer, and his refusal. The rule

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But, apart from the application and order to inspect and indefinite, both as to time and place, are not to be inspected, and as to the making exhibition of the records for inspection. The order of the municipal corporation does not show what officer of the District is the custodian of the records required to be inspected, and for inspection was made of such records and documents, while the Commissioners of the Corporation, and are authorized to exercise corporate rights and duties of the municipal government. The court below would not permit as the proper place for the records desired to be inspected in application for the rule to require the record or document to be produced by the officer having control thereof to be enforced; for it is contempt for disobedience of the order of a municipal corporation by its officers and agents to disobey the process of the court. (207, 209.)

The case of the *Corp*
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ters, and writings belonging to the corporation and in its custody, relating to certain tolls. Upon objection to the rule upon the ground that it was too general and indefinite, the counsel who appeared to support the rule, admitted that the rule was drawn in terms too large, but contended that it might be granted as to *such deeds* as respected the question of tolls. "*But the court* doubted how any rule of that sort could be *served upon the corporation*, as such, in the terms of the proposed rule; but they asked the defendant's counsel whether he would be content to take a rule upon the *town clerk*, to give on oath an inspection of all such parts of the deeds, etc., as respected the question of toll; to which the defendant's counsel assenting, a rule was granted absolutely in the first instance.

The cases upon the subject are brought together in 6 Ency. Pl. & Prac., at pages 800-809, to which we refer, and where the principle is stated to be, that the books, documents or papers, of which inspection is sought, should be described with sufficient certainty to enable the party upon whom the rule is made to know what books or documents he is required to produce for inspection. A mere fishing inquiry will not be directed by the court.

The general principle of the cases, and what is required in practice, is succinctly but clearly stated by Mr. Greenleaf in his work on Evidence, under title "Public Documents," where he says: "The motion *for a rule to inspect and take copies of books and writings, when an action is pending*, may be made at any stage of the cause, and is founded on an *affidavit*, stating the circumstances under which the inspection is claimed, and that an application therefor has been made to the proper quarter, and refused. But *when no action is pending*, the proper course is to move for a rule to show cause why a *mandamus* should not issue, commanding the officer having custody of the books to permit the applicant to inspect them, and take copies. The application in this case should state some specific object sought by the inspection, and be supported by an *affidavit*, as in the case preceding;" that is to say, as in the case where an action is

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 attachment. *Order*

THE CONSUMERS' BREWING COMPANY

v.

TOBIN.

PLEADING AND PRACTICE; AFFIDAVITS OF DEFENSE.

Where an affidavit of defense, in an action on a promissory note and an open account, denies defendant's liability on the note upon grounds stated in the affidavit, and claims credit upon the open account for a certain sum, and the plaintiff's attorney in his argument in this court on an appeal (specially allowed) from an order overruling the plaintiff's motion for judgment, admits the credit claimed by the defendant, but the record does not show such an admission, the judgment of the lower court will be affirmed, without regard to the sufficiency of the defense as to the note, as the case stands upon the sufficiency of each defense set out in the defendant's affidavit.

No. 1122. Submitted October 4, 1901. Decided November 6, 1901.

HEARING on an appeal (specially allowed) by the plaintiff from an order of the Supreme Court of the District of Columbia, overruling a motion for judgment under the seventy-third rule of that court, for want of a sufficient affidavit of defense, in an action of *assumpsit*. *Affirmed*.

The COURT in its opinion stated the case as follows:

This is an appeal by the Consumers' Brewing Company, plaintiff below, from an order denying a motion for judgment under Rule 73 of the Supreme Court of the District of Columbia.

Plaintiff sued the appellee, Edwin Tobin, upon a promissory note executed June 19, 1900, for \$1,021.44, admitting a credit thereon of \$329.51, and also for the sum of \$35.05 for merchandise sold and delivered; the aggregate amount-

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Statement of the Case.

ing to \$774.02. An affidavit, in substantial compliance with the requirements of Rule 73, was filed with the declaration.

Defendant's plea to the counts of the declaration was the general issue.

To prevent judgment under the rule, defendant filed an affidavit admitting the execution and delivery of the note, but denying liability thereon. He admits the account for goods sold, but claims a credit thereon of \$15.75, stating the items thereof with particularity, and their former allowance by the plaintiff as just and correct.

The ground of defense to the note is thus stated: "The same was procured by the fraudulent misrepresentations and imposition of one Edward L. Jordan, at and before the time of the execution thereof, the said Jordan being at said time the president of the plaintiff company; that shortly before the execution of said note the said Jordan informed affiant that the chattels, fixtures, and other personal property then in a certain hotel, known as the "Exchange and Ballard Hotel," were for sale, and advised and urged affiant to purchase the same and engage in business in said place; that this affiant was totally unacquainted with the value of the said stand as a business place, and was also unacquainted with the city of Alexandria, Virginia, where said hotel is located, but relied upon the aforesaid representations of the said Jordan, who informed affiant that said place was a good business stand; that the said Consumers' Brewing Company had shortly before said time bought in at auction the said goods and chattels for the sum of six hundred (\$600) dollars at a sale by one James Caton, as trustee under a chattel mortgage or deed of trust securing the said plaintiff company; that, acting upon the aforesaid advice and representations of the said Jordan, affiant agreed to purchase said chattels and fixtures and personal property, and took a bill of sale therefor, executing a note payable to Abe King, the secretary and treasurer of the plaintiff company and a nominal party to the transaction, who afterwards indorsed the same over to the plaintiff company; that affiant entered into the possession of the said hotel and com-

menced the conduct of said business; that said business was unprofitable from the start, and affiant abandoned the active management thereof and sold the stock in trade therein to one Edwin Dean, who agreed to pay affiant the sum of five and $\frac{11}{100}$ (\$5.11) dollars monthly as rent for said goods and chattels, said sum being the amount of interest due monthly on said promissory note; that, as aforesaid, affiant admits the nonpayment of said note, and affiant further admits that demand for payment was made at the bank where same was made payable; that sale of the chattels for which said note was executed and on which said note was secured, as set out in the affidavit of the plaintiff, was made, and the sum of three hundred and fifty (\$350) dollars was received for said chattels, but the trustees under said chattel trust, who were the then president and the then attorney of the said plaintiff company, never rendered this affiant any account; that affiant expended large sums of money in attempting to conduct said business and lost a considerable sum by reason of the venture; that but for the aforesaid representations and suggestions of the said Jordan affiant would not have purchased said goods, chattels, and personal property, and affiant here charges that said chattels were not worth the sum of ten hundred and twenty-one and $\frac{44}{100}$ (\$1,021.44) dollars, the amount of said note, nor was the said business a profitable one, and the said Jordan well knew the same, but, notwithstanding, fraudulently persuaded this affiant to execute the said note; that this affiant is informed and believes, and so charges, that the object of the said Jordan in inducing him to purchase said place was to secure the payment of a debt due said company by the former owner of said chattels and occupant of said hotel; that the said company is not an innocent holder of said note, but, as aforesaid, the said payee, King, is an officer of said company and a nominal party to said transaction, and the said Jordan was at the time of the execution of the said note the president of said company."

The plaintiff moved for judgment notwithstanding the affidavit, on the ground of its insufficiency, and from the order refusing the same, has perfected his appeal under leave obtained therefor.

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Mr. Lorenzo A. Bailey for the appellant.

Mr. Ellis Hughes for the appellee.

Mr. Justice SHEPARD delivered the opinion of the Court:

On the argument, counsel for the appellant concedes the sufficiency of the affidavit in respect of the credit claimed, and makes the statement that he had admitted the same in the hearing below. The record, however, was not made to show the admission and the case stands upon the sufficiency of each defense set out in the affidavit.

As the several items composing the credit have been set out in the affidavit with unquestioned certainty of statement, the order refusing the motion for judgment must necessarily be affirmed, without regard to the question of the sufficiency of the allegations in respect of the grounds of defense to the note.

The case is one at law, and the particular procedure is under an authorized rule of court designed to prevent delay by cutting off the regular jury trial to which the party is entitled at common law, unless he shall make, "along with his plea, if in bar, an affidavit of defense denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part."

For these reasons we are not at liberty to permit an amendment, or an admission of record accomplishing the same purpose, in order that the question arising on the remainder of the affidavit may be separately and singly considered and determined.

The order denying the motion for judgment will, therefore, be affirmed, for the reason given, without intimating an opinion in respect of the sufficiency of the affidavit in so far as it relates to the ground of defense to the note.

The order is affirmed, with costs.

'Affirmed.

TRALLES

v.

THE METROPOLITAN CLUB.

EQUITY; BILL OF INTERPLEADER.

1. A bill of interpleader is not maintainable by a stakeholder against the claimants of the fund in his hands when he has already contested his liability to them in an action at law and judgment has been rendered against him, and where there is nothing of an equitable character involved upon which the court of law was not competent to pass.
2. Where a stakeholder defends an action at law to recover the fund in his hands upon the ground that the fund belongs to other claimants who are not parties to the action, and judgment is rendered against him, the fact that such other claimants are parties to a bill of interpleader subsequently filed by him, will not add an element of equity to the controversy which will render the bill of interpleader maintainable.

No. 1181. Submitted October 4, 1901. Decided November 5, 1901.

HEARING on an appeal by one of several defendants from an order of the Supreme Court of the District of Columbia, requiring the defendants to interplead as to their claims to a fund in controversy and continuing a restraining order previously granted, enjoining the defendants from proceeding at law. *Reversed.*

The COURT, in its opinion, stated the case as follows:

This is an appeal [by one of several defendants] from an order or decree of the Supreme Court of the District of Columbia in a suit in equity, instituted by the appellee, The Metropolitan Club, as complainant, whereby the other par-

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As stated in this
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Apparently, however, this was only to secure to Tubbins the sum of \$49 due to him by Grunewald, which, it seems to be conceded by all the parties, should be first paid to him out of the fund in controversy. No one seems to contest his claim or its priority, although the nature of it is not disclosed by the record.

As also stated in the answer of the club to the writs of attachment, the appellant Tralles, on January 7, 1901, addressed a notice to the club that Grunewald had assigned the indebtedness to him; and the club in due time acknowledged receipt of the notice. This assignment appears to have been for the benefit of creditors, but not of all the creditors,—for Lynn, Edson Brothers, and Tubbins were not named in it; and it appears not to have been anywhere recorded, nor did it convey all of Grunewald's property.

Issue was joined by Lynn in his suit against Grunewald on the answer of the club to the writ of attachment. Tralles at this point intervened, and became a party to the suit. The matter came on before the justice of the peace on February 5, 1901; and the justice on the same day rendered judgment of condemnation against the club and in favor of Lynn; and Tralles appealed. The judgment was for \$96.64.

At the same time, or immediately afterwards, the justice of the peace rendered a judgment of condemnation against the club and in favor of Edson Brothers for as much of the indebtedness of the club to Grunewald as might be left after the satisfaction of the judgment in favor of Lynn and the payment of \$49 to Tubbins. Tralles had not intervened in this Edson suit as he had in the Lynn suit. It is alleged by the club that Tralles had due notice that this suit, as well as that of Lynn, would come on for hearing on February 5, 1901, on the writ of attachment and the answer thereto of the plaintiff. This Tralles does not deny: he only denies that he had any notice of a joinder of issue therein; and he admits that there was an agreement between counsel that whatever judgment was entered in the one case should be entered in the other.

On January 31, 1901, Tralles brought suit in the name

TRALLES

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review the judgment or judgments, or to enjoin execution thereof, except for fraud in obtaining them. 11 Ency. Pl. & Pr., p. 462, and note; *Haseltine & Walton v. Brickey et al.*, 16 Gratt. 116; *Cheever v. Hodgson*, 9 Mo. App. 568; *McKinney v. Kuhn et al.*, 59 Miss. 186; *Yarborough v. Thompson*, 3 S. & M. 291; *Mitchell v. N. W. Manf. & Car Co. et al.*, 26 Ill. App. 295. In Maryland the rule was considered too well settled to permit of discussion. *Union Bank of Maryland v. Kerr & Glenn*, 2 Md. Ch. 460. Relief against an erroneous judgment cannot be granted in equity. Hilliard on Inj., pp. 29, 193-195. To entitle a court of equity to enjoin a judgment two circumstances must appear: 1. That it would be contrary to equity and good conscience to allow enforcement. 2. That the facts which make it so were not available at law. *Stare Decisis and Res Adjudicata* (Wells), 496; *Insurance Co. v. Hodgson*, 7 Cr. (S. C.) 335; *Marshall v. Holmes*, 141 U. S. 596. There is nothing in this case to distinguish it from the interpleader cases above cited. In many of them the stakeholder was liable to pay his original debt twice; but this was held no ground for intervention.

Mr. James H. Hayden, for the appellee:

1. It is undoubtedly true that courts of equity are slow to disturb or undo the work of law courts. They will not permit a resort to equity merely to litigate again the same question. They will not relieve a party who has been guilty of *laches*. But where a party has not been thus guilty, where he has been unable to secure a fair and complete hearing at law, and by reason thereof is in danger of unjust exactions, it is the duty of equity to intervene. *Freeland v. Williams*, 131 U. S. 405, 418; *Johnson v. St. Louis, etc., Railway*, 141 U. S. 602, 610, 611; *Philips v. Negley*, 117 U. S. 665, 675. In the present case it was not possible for the Metropolitan Club to bring all of the parties together before a court of law, in order that the respective merits of their conflicting claims could be tested. Tralles was careful to bring

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Argument of Counsel.

his suit against the club before a justice of the peace other than the one before whom the cases of Lynn and Edson Brothers were tried. Tralles intervened in the case of *Lynn v. Grunewald*, and took an appeal from the judgment of condemnation entered therein, while, with an equally good opportunity, he avoided putting himself on record in the case of Edson Brothers. In none of the proceedings at law could a judgment have been entered which would have passed upon the relative merits of the claims of all of the defendants and been conclusive upon all of them, and so enabled the club to know what person was entitled to receive the money. After judgment on appeal in the case of *Tralles v. Metropolitan Club* it stood liable to pay more than the whole amount of its indebtedness, to satisfy that judgment, and the one obtained by Edson Brothers. Again, Tubbins has never appeared in court. His claim is still valid. He is not concluded by Tralles' judgment, which allows him \$49. He may still bring suit against the club, claiming that by virtue of his order on the club, which antedated Grunewald's assignment to Tralles, he is entitled to the whole amount. It may be true that the agreed statement of facts upon which the cases of *Lynn v. Tralles*, and *Tralles v. Metropolitan Club* were tried is substantially the same as the statement contained in the amended bill; but the trial court had no authority to adjudicate any issues except those between the parties before it. It was proper to consolidate the two actions for the purpose of trying them together, because the parties consented, but the trial court had no authority to embrace its rulings in the two cases in one judgment as it did. It had no authority to include in its judgment the award in favor of Tubbins, who was not in court and could not have been brought in. Nor did the court attempt to adjudicate the claim of Edson Brothers, who were not in court, and could not have been brought in. 4 Ency. of Pl. & Pr., p. 677.

2. On the facts the club is not chargeable with *laches*. The court below, in granting the injunction, followed the doctrine laid down by the Supreme Court in cases cited

above, namely, that the entry of a judgment at law, alone, does not preclude a court of equity from inquiring into the facts, and, in a proper case, from forbidding the execution of the judgment. See also *Lozier v. Van Suan*, 3 N. J. Eq. 325; *School District v. Weston*, 31 Mich. 87.

Mr. Justice MORRIS delivered the opinion:

It sufficiently appears from the record of this case that all the facts stated in the amended bill of complaint of the Metropolitan Club were set forth in the statement of facts submitted to the court of common law in the consolidated causes of *Lynn v. Tralles*, intervenor, and *Grunewald to the use of Tralles v. Metropolitan Club*, and were there adjudicated. Nothing new is here set up which was not fully set up in those causes. It is very true that Edson and McCulloch were not parties to those causes, and were not before the court in them, and consequently that their rights were not involved and could not have been concluded by the judgment or judgments rendered therein. But the facts constituting their claim were before the court, and were relied on by the Metropolitan Club as constituting a defense to the claim of Tralles against it. The whole subject-matter of the present suit was litigated in those causes; and there was nothing of an equitable character involved upon which the court of common law was not competent to pass.

This being the case, it is not competent for parties to litigate the same precise matter again in a court of equity, and thereby to convert the court of equity into a tribunal for the review of the judgment of the court of common law. Both upon reason and upon authority we regard it as well-settled law that a bill of interpleader cannot be maintained by a stakeholder against claimants of the fund in his hands when he has already contested his liability to them in a court of common law and judgment has been rendered against him. *Union Bank v. Kerr and Glenn*, 2 Md. Ch. 460; *Cornish v. Tanner*, 1 Younge & Jervis, 333; 3 Daniell's Chan. Pr.,

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p. 1755; *Haselline v. Brickey*, 16 Gratt. 116; *Cheever v. Hodgson*, 9 Mo. App. 565; *McKinney v. Kuhn*, 59 Miss. 186; *Yarborough v. Thompson*, 3 S. & M. 291; *Mitchell v. N. W. Manf. & Car Co.*, 26 Ill. App. 295; *Fairbanks v. Belknap*, 135 Mass. 179.

A stakeholder having money in his hands claimed by two or more persons, and to which he himself has no claim, has two courses open to him,—one to await suit by the parties and defend as best he can the interest of the party whom he regards as best entitled, and the other to file a bill of interpleader in equity against all the parties requiring them to litigate the matter between themselves. In the adoption of the first course he assumes the risk of having more than one judgment rendered against him for the same money and of being required to pay to each of two or more persons a sum which in justice and equity he should only pay once. Hence only in equity by the adoption of the second course can he protect himself completely and escape personal liability to any of the claimants. But it is very plain that he may not pursue both courses, and that, if he would avail himself of the protection of equity, he should not litigate with the parties at common law and have judgment rendered against him. It is the special purpose of a bill of interpleader not only to protect the stakeholder against several suits by two or more claimants, but likewise to save all the parties against the cost and annoyance of several independent suits. Something is due to the claimants in such cases as well as the stakeholder. The former should not be put to the trouble of litigating their claims twice any more than the latter should be twice rendered liable for the one amount in his hands. A bill of interpleader, seasonably filed, is sufficient to protect all interests alike, and to determine to whom in justice the money should be paid; and if the holder of the money does not choose to avail himself of this safeguard at the proper time, and, on the contrary, puts the parties to the trouble and expense of forcing him to judgment, he has only himself to blame for his predicament. Judgments rendered against him in such case are not unjust judgments for which he is

entitled to the intervention of equity, but adjudications provoked by himself with full knowledge of the risks which he incurs.

Only two cases appear to have been found which seem to contravene the doctrine that a bill of interpleader cannot be maintained after the rendition of judgment at common law on behalf of one or more of the claimants against the stakeholder. One of these is the case of *Lozier v. Van Saun*, 3 N. J. Eq. 325, and the other is that of *Hamilton v. Marks*, 19 Eng. Law & Eq. Rep. 321. But these cases are rather exceptions to the rule than authorities against it; and they so purport to be upon their face.

In the case of *Lozier v. Van Saun* there had been a judgment of condemnation at law rendered against administrators of an estate who held a disputed fund. But it appeared that their defense to the claim was entirely equitable and could not have been availed of in the suit at law. And in the case of *Hamilton v. Marks*, in which also a bill of interpleader was sustained after a judgment at law against the complainant in the bill procured by one of the claimants, the fund in controversy consisted of the proceeds of a policy of insurance, liability upon which was contested, and it was necessary to establish the liability by a suit at common law and judgment thereon. No doubt other exceptional conditions of a similar character might arise. But these do not militate against the general rule, that a person having a fund in his hands which he concedes not to belong to himself, but to some one or other of the claimants who make demand upon him for it and between whose conflicting claims he cannot safely determine, is not justified in litigating the matter with any one or more of such claimants at common law, and upon being defeated there, resorting to a court of equity for a second trial of the same issue by way of a bill of interpleader. The principle of *res adjudicata*, now so well established, forbids any such proceeding.

It is no answer to this proposition in the present case that the appellees Edson and McCulloch are parties to the present proceeding and were not such to the consolidated suits at

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law which have been mentioned; and, therefore, that their preence adds a new element of equity to the controversy, which was absent from those consolidated suits. But the complainant in the bill of interpleader had undertaken to defend itself in those suits against the claim of the defendant Tralles, the appellant here, by setting up not only the claim of Lynn, who was a party to them, but likewise the claim of Edson and McCulloch, who were not parties. By so doing it concluded itself as to the validity or invalidity of that claim by the judgment that was rendered by the court, although, of course, Edson and McCulloch were not so concluded. Edson and McCulloch already had a judgment of condemnation against the club, rendered by the justice of the peace. No appeal had been taken from that judgment by any one; and it was unnecessary, and indeed it would have been improper for Edson and McCulloch themselves to have sought to make themselves parties to the other suits. It would appear from the record that there was some understanding or agreement between counsel that whatever final judgment should be rendered in the Lynn case should likewise be rendered in the case of Edson and McCulloch, the conditions of the two cases being identical. If such agreement or understanding there was, it was, and perhaps yet is, the complainant's equitable right to have it carried into effect, and thereby to save itself from a double payment. But such equity does not justify the filing of a bill of interpleader and reopening a controversy which has already been adjudicated.

In view of what we have said, it necessarily follows that, in our opinion, the bill of interpleader in this case cannot be maintained, and that it was error to have decreed that the defendants in the cause should interplead between themselves. Only one of those defendants, however, George E. Tralles, has appealed from the decree. The other defendants may be presumed to have acquiesced in it; and the defendants Edson and McCulloch, in furtherance of the cause, have filed a cross-bill therein. But this cross-bill is not before us on this appeal; nor are Edson and McCulloch, or Lynn, or Tub-

bins before us as complaining of the decree. Our present adjudication, therefore, must be confined to the appeal of Tralles from the injunction *pendente lite* and the decree of interpleader rendered in the cause against him. As to him we hold that there was error.

Our conclusion is that, as to the appellant Tralles, the decree appealed from must be *reversed, with costs; and the cause must be remanded to the Supreme Court of the District, with directions to dismiss the bill of complaint as to him. And it is so ordered.*

BROWN v. OHIO NATIONAL BANK.

AFFIDAVITS OF DEFENSE; PROMISSORY NOTES.

1. Affidavits of defense under the seventy-third rule of the lower court should be construed liberally and need not be drawn with such precision as to meet technical objections that might be urged, but must allege facts indicating with reasonable distinctness and precision a substantial legal defense and sufficient to satisfy the court of the good faith of the defendant; *following* Cropley v. Vogeler, 2 App. D. C. 28; Bailey v. District of Columbia, 4 id. 356; Pumphrey v. Bogan, 6 id. 449; Gleason v. Hoeke, 7 id. 1; Strauss v. Hensey, 7 id. 289.
2. One who purchases from a national bank a number of shares of its capital stock, paying part cash therefor and giving his promissory note for the balance of the purchase price, and leaving the shares of stock in the hands of the bank as collateral security for the payment of the note, cannot defeat a recovery by the bank upon the note upon the ground that section 5201, R. S. U. S. prohibits national banks from making any loan or discount on the security of the shares of its own capital stock, and from becoming the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith.
3. An affidavit of defense in an action by a national bank upon a promissory note, is insufficient which alleges that the note was given to the bank in part payment for ten shares of its capital stock upon the representation by an agent of the bank that the defendant would

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be made a director; that the bank went into voluntary liquidation before the maturity of a note given in renewal of the original note; that the bank since going into liquidation has paid all its depositors and other creditors; that at the time of the purchase, the shares of stock, as affiant is informed and believes and expects to show at the trial, were of no value and have been of no value since; that affiant was not made a director or offered the position, and that he expects to show at the trial that it was never the intention of the bank or those in charge thereof to offer him such a position, but that he was induced by such fraudulent representations to enter into the arrangement set forth.

No. 1106. Submitted October 11, 1901. Decided November 6, 1901.

HEARING on an appeal by the defendant from a judgment of the Supreme Court of the District of Columbia under the seventy-third rule of that court, for want of a sufficient affidavit of defense, in an action upon a promissory note. *Affirmed.*

The COURT in its opinion stated the case as follows:

The Ohio National Bank sued the appellant, Thomas A. Brown, upon a promissory note for the sum of \$839, which recites the deposit, as collateral security, of a certificate for ten shares of the capital stock of the plaintiff corporation.

The declaration was supported by an affidavit as required by Rule 73, to the sufficiency of which no objection was made.

Defendant filed an affidavit of defense which, having been held insufficient, is here recited in full:

"I am the defendant in the above-entitled cause, and I deny the right of the plaintiff in said cause, The Ohio National Bank, as to the whole or any part of its claim against me, as set out in its declaration, particulars of demand, and affidavit. The grounds of my defense thereto are as follows: In the month of December, 1896, an agent of the plaintiff, The Ohio National Bank, represented to me that it was the desire of those in charge of the affairs of said bank, namely, certain officers of said bank, who owned or controlled a majority of its capital stock, to make certain changes in its board of directors by electing certain residents

of the District of Columbia as members of the board in place of certain nonresidents, it being believed it would be to the interests of the bank so to do. It was also represented to me that I would be elected a member of said board of directors if I would purchase ten shares of the capital stock of the bank. I was unwilling to buy outright any of the shares of the said capital stock, but, upon it being proposed to me on behalf of the bank or said holders of a majority of its capital stock that the bank would loan practically all of the money necessary for me to purchase ten shares of the said capital stock and would take said ten shares as collateral to secure said loan, I consented to this arrangement, and on or about December 29, 1896, gave my note payable to the bank for about nine hundred and forty dollars (\$940), less the sum of \$90 which I paid in cash to said bank, the purchase being of ten shares of the said capital stock at the price of ninety-four dollars (\$94) a share. The original note, which I gave to said bank, was made payable in about ninety days after date, and at its maturity I paid up the interest which had accrued thereon, curtailed the indebtedness represented thereby in a small amount, and gave a new note for the balance. The note in suit is a renewal of the original note and represents the purchase price of the said stock at nine hundred and forty dollars (\$940), less the sum or sums that I have paid in cash on account of said purchase price. The plaintiff bank, a majority of whose capital stock was owned by two or three of its officers, went into voluntary liquidation on or about December 31, 1897. The said bank has since paid all of its obligations to its depositors and other creditors, but no final settlement of its affairs has been made so far as the shareholders are concerned, although various efforts have been made on the part of the shareholders to obtain a final settlement of the bank's affairs. I also aver on information and belief and expect to prove at the trial that at the time I was induced to purchase the said shares of stock in question in the manner aforesaid the said shares were of no money value (although I was ignorant of that fact), and have been of no value since; that those in charge

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of the affairs of said bank were making strenuous efforts to prevent the real financial condition of the bank from being publicly known; that at or about the time of said purchase no purchaser or purchasers for cash in the open market or otherwise could be found of the shares of capital stock of said bank, although a large amount of such capital stock, aggregating \$20,000, was being offered for sale; that those in charge of said bank, desiring to get in said stock so offered for sale, acquired, in some way unknown to me, the same on behalf of said bank and induced and procured various persons, including myself, to go through the form of purchasing said stock so acquired by giving their promissory notes therefor for a price known to be fictitious to those in charge of said bank's affairs, but not to said purchasers, and to secure the payment of said promissory notes by allowing said bank to retain said shares of stock as collateral security for the payment thereof; that said proceeding was declared to be unlawful by the Comptroller of the Currency, and thereupon said bank either released said purchasers or their purchases (except affiant) or got from them money or indorsed notes in payment of said stock; but affiant was not informed of the transaction or given any opportunity of withdrawing therefrom.

"I further aver that I was never made a director of said bank, nor was such a position ever offered or tendered me, and I expect to show at the trial hereof that it was never the intention of the said bank or those in charge thereof to offer or tender me such position, but that I was induced by such fraudulent representations to enter into the arrangement above set forth.

"I further aver that the said promissory note sued upon is wholly without consideration and is void, first, because the shares of stock for which said note was given were valueless at the time of the alleged transfer of the same to me and have been of no value since; and, secondly, because the said bank, being a national bank, was prohibited by law from making any loan on the security of its capital stock under the circumstances set forth."

Judgment for the plaintiff was rendered upon motion therefor, notwithstanding the affidavit of defense, and the defendant has appealed.

Messrs. Davis & Tucker, for the appellant:

1. The original transaction between the appellee and appellant was in substance an attempted loan or discount upon the security of the capital stock of the appellee bank and void under Sec. 5201, R. S. U. S. If the appellant had received and retained any benefit in the transaction, he would be estopped to make this defense; but as he has not, but, on the contrary, has parted with \$109, for which he has received nothing, the contract, whatever it was, is executory, and the defense is a proper one. Appellee is still in possession of the certificate of stock. For construction of Sec. 5201, U. S. R. S., see *Bank v. Stewart*, 107 U. S. 676. Where neither party has acted upon an *ultra vires* contract, the only injustice caused by a refusal to enforce it is the loss to the parties of prospective profits, and this is too slight a consideration to weigh against the reasons of public policy for declaring it void and not enforceable. See 27 A. & E. Ency. of Law (1st ed.), 361 *et seq.*; Green's Brice's *Ultra Vires*, p. 42. In *Bank v. Lanier*, 11 Wall. 369, it was held that a contract whereby a banker, to secure a deposit made by a national bank with his firm, placed with the national bank a number of shares of the latter's capital stock, was void and not enforceable under Section 5201.

2. The note in suit is void for want of consideration, appellant's affidavit of defense stating that he is informed and believes and expects to show at the trial that the shares of stock for which the note in suit was given were and are valueless. Of course the value of the capital stock of a corporation depends upon its financial condition. If the debts of the concern are greater than its assets — in other words, if it is insolvent — its stock has no value. The appellant expected upon the trial to show that such was the condition of the appellee when it unloaded ten shares of its capital

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Argument of Counsel.

stock upon him, and that its officers who controlled its operations and who owned a majority of its capital stock knew this, and resorted to most desperate efforts and most questionable methods to get rid of its stock. It is admitted that mere inadequacy of consideration (unless it be so inadequate as to show fraud) will not render a contract void. To have this effect there must be a total want of consideration. Here it is submitted there is no consideration whatever to support the note sued on. If the shares of stock were valueless, as is alleged, what benefit has the appellant received, or what detriment has the appellee suffered? A valuable consideration is necessary to support any contract, and the rule makes no exception as to the character of the consideration respecting negotiable instruments when the consideration is open to inquiry. *Daniels on Neg. Instr.* (4th ed.), Sec. 179. A promissory note, the sole consideration of which was an interest in a telephone exchange company, whose business and property were valueless except as operated to infringe upon the rights of another company, is without consideration and void. *Clemshire v. Bank*, 53 Ark. 512, and cases cited. A promissory note given by a widow to a creditor of her deceased husband for the amount of his debt is void for want of consideration, if the husband has left no estate or assets, though the creditor gives the widow at the same time a receipted bill acknowledging payment from her husband's estate of the note. *Williams v. Nichols*, 10 Gray (Mass.), 83. The plaintiff held the note of the defendants' deceased father, which he gave up to the defendants upon their promise to pay the amount. The deceased left no property and there was no administrator and the note was, therefore, worthless. *Held*, that the promise of the sons was *nudum pactum*. *Schroeder v. Fink*, 60 Md. 436.

3. The facts disclosed in appellant's affidavit of defense show such fraud as, if proved, would render the note void in the hands of the payee. The shares of stock of the bank for which the note was given were issued, if at all, by the bank itself or its officers, who owned a majority of its stock. They knew its financial condition and the worthlessness of the

stock. In the words of the affidavit of defense, they "were making strenuous efforts to prevent the real financial condition of the bank from being publicly known," and "induced and procured various persons, including myself, to go through the form of purchasing said stock * * * for a price known to be fictitious." In addition to this, the appellant, as his affidavit of defense shows, was induced to enter upon the transaction by the promise by an agent of the bank that he should be made a director, and he says that he was never made a director, nor was such position ever offered or tendered him, and that he expects to show at the trial that it was never the intention of the said bank, or those in charge thereof, to offer or tender him such position; but that he was induced by such fraudulent representations to enter into the arrangement. Besides this, the bank went into voluntary liquidation before the note in suit matured, and while it has paid its depositors, its shareholders have never been able to obtain a settlement of its affairs. While inadequacy of consideration in the origin or transfer of a negotiable instrument is not, in itself, a defense to a suit upon it, yet it is oftentimes a circumstance strongly tending to show a fraud in the contract in which it was given or transferred. Evidence, therefore, in a suit on a note for certain pictures, is not admissible for the purpose of reducing the damages by proving that they were of inferior value, but it would be good to show that they were fraudulently palmed off on the defendant. 1 Daniels on Neg. Instr. (4th ed.) Sec. 193, citing, among other cases, *Solomon v. Turner*, 1 Stark. 51 (2 E. C. L. R.). Surely there is enough in this affidavit of defense to show that these ten shares of stock were "fraudulently palmed off" on this appellant; and, if so, the appellant is entitled to a trial.

4. Fairly tested by the rule laid down by this court, that such affidavits are to receive a liberal construction, the affidavit of defense here is a sufficient one. *Lawson v. Hammond*, 4 App. D. C. 467; *Gleason v. Hoeke*, 5 App. D. C. 1; *Strauss v. Hensey*, 7 App. D. C. 289; *Pumphrey v. Bogan*, 8 App. D. C. 449; *St. Clair v. Conlon*, 12 App. D.

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C. 161. It is not to be tested as a plea would be upon a demurrer. *Bailey v. District of Columbia*, 4 App. D. C. 356. The fact that a portion of it is based upon information and belief and expectation of being able to prove the facts recited at the trial does not render it insufficient. *Richmond v. Cake*, 1 App. D. C. 447.

Mr. Jesse C. Adkins, for the appellee.

Mr. Justice SHEPARD delivered the opinion:

1. Rule 73, enacted by the Supreme Court of the District under power conferred by statute, provides that where the plaintiff has accompanied his declaration with the required affidavit, the defendant, in order to prevent judgment on motion, must file, "along with his plea, if in bar, an affidavit of defense denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defense, which must be such, as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part."

Many cases have been determined by us on appeal, involving in one form and another the application of this rule; and, whilst the facts and circumstances of particular cases differ so that the decision of one cannot afford a certain rule for the determination of another, yet some principles have been well settled that have general application in all. Some of these may be appropriately stated, preliminary to the consideration of the several points of defense that are claimed to appear in the appellant's affidavit, and are presented as grounds for the reversal of the judgment.

The rule deprives a party of his ordinary right of jury trial and should be strictly interpreted as regards to the affidavit of the plaintiff, and broadly and liberally construed as regards the counter affidavit of the defendant. *Lawrence v. Hammond*, 4 App. D. C. 467; *Gleason v. Hoeke*, 5 App. D. C. 1, 5.

The affidavit of defense is not the substitute for a special

plea, and need not be drawn with such precision as to meet technical objections that might be urged; but, at the same time, it must allege facts indicating with reasonable distinctness and precision a substantial legal defense, and sufficient to satisfy the court of the good faith of the defendant. *Cropley v. Vogeler*, 2 App. D. C. 28, 32; *Bailey v. District of Columbia*, 4 App. D. C. 356, 370; *Gleason v. Hoeke*, 5 App. D. C. 1, 7; *Strauss v. Hensey*, 7 App. D. C. 289; *Pumphrey v. Bogan*, 6 App. D. C. 449, 451.

"If there be nothing in the general statement of the facts of the defense to indicate or suggest evasion or studied uncertainty of allegation or denial in matters susceptible of clear and precise statement; and if it appear by any reasonable or fair construction that the facts so generally stated would constitute a defense to the plaintiff's action, in whole or in some part, the constitutional right of trial by jury must be accorded." *St. Clair v. Conlon*, 12 App. D. C. 161, 163. See also *Magruder v. Schley*, 17 App. D. C. 227, 231.

1. The first proposition in support of the sufficiency of the affidavit is, that the note represents a loan of money by a national bank upon the security of its capital stock, in violation of the express prohibition of Section 5201, R. S. U. S., which reads as follows:

"No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall, within six months from the time of the purchase, be sold or disposed of at public or private sale; or in default thereof, a receiver may be appointed to close up the business of the association according to Section 5234."

We do not find that the statement of the transaction shows a loan of money by the plaintiff upon the security of shares of its capital stock owned and held by the defendant. On the contrary, it appears that the defendant purchased the stock from the bank, chiefly upon credit, and executed his note for the purchase money, leaving the stock in the posses-

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sion of the bank as security for the payment of the note. The affidavit states that the bank had, in some way, come into possession and ownership of shares of its own stock of the face value of \$20,000, which it undertook to resell.

In the absence of proof to the contrary, even if the same would be admissible, this ownership was presumably acquired under the permission of the foregoing section, and having been so acquired it was the duty of the bank to resell the same within six months at public or private sale. There is nothing in the law that would prevent, or punish, a private sale upon credit with the retention of the stock as collateral security, provided the transaction be, in good faith, what it purports to be.

In this view of the substantial effect of the allegation of the affidavit of defense, it becomes unnecessary to discuss the interesting arguments, or review the various decisions relating to the effect of section 5201 upon loans made in violation of its terms.

3. The next ground of defense is the failure of consideration of the note, and must be determined by the following facts which appear substantially in the affidavit.

The bank had been organized under the laws of the United States and was a "going concern" on December 29, 1896, when defendant purchased ten regular shares of its capital stock, paying \$90 in cash and executing his note for the remainder due in ninety days. This note was renewed from time to time until October 28, 1897, the date of the note in suit. The bank went into liquidation December 31, 1897, and "has since paid all of its obligations to its depositors and other creditors, but no final settlement of its affairs have been made so far as the shareholders are concerned, although various efforts have been made on the part of the shareholders to obtain a final settlement of the bank's affairs."

The motive of the purchase was the representation to defendant by an unnamed "agent of the plaintiff" who, he says, "represented to me that it was the desire of those in charge of the affairs of said bank, namely, certain officers of said bank, who owned or controlled a majority of its capital

stock, to make certain changes in its board of directors by electing certain residents of the District of Columbia as members of the board in place of certain nonresidents, it being believed it would be to the interests of the bank to do so. It was also represented to me that I would be elected a member of said board of directors if I would purchase ten shares of the capital stock of the bank."

The remaining relevant statement under this point is: "I also aver on information and belief and expect to prove at the trial that at the time I was induced to purchase the said shares of stock in question in the manner aforesaid, the said shares were of no money value (although I was ignorant of that fact), and have been of no value since." The remaining allegations of the affidavit, as will appear in the statement, add no weight to the foregoing, but either repeat them or have relation to the allegations of fraudulent representations.

Viewed apart from the defense of fraud hereafter to be considered, we cannot regard the affidavit as indicating a substantial defense of failure of consideration.

It is plain that the stock had been legally issued, had come into the ownership of the corporation, and had been regularly transferred to the defendant in accordance with the terms of his contract of purchase. That the shares had some nominal value, at least, when purchased, was not, and apparently could not, be denied. Aside from their validity as part of the capital stock, the existence of some actual value, however small, is apparent in the fact that the bank remained in business for a year longer, during which the defendant voluntarily renewed his note once, and probably twice, and that, since going into voluntary liquidation, it has satisfied the demands of all depositors and other creditors.

It is plain that the defendant actually received all that he bargained for, notwithstanding the subsequent failure to realize his expectations of profit or advantage.

It seems to be thoroughly well-settled law, that failure of consideration must be total to constitute a good defense to an

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action upon the promise. *Greenleaf v. Cook*, 2 Wheat. 13, 16.

If there be any consideration at all the courts will not inquire into its adequacy, or attempt to weigh the extent of it. *Nash v. Lull*, 102 Mass. 60, 62; *C. & A. RR. Co. v. Derkes*, 103 Ind. 520, 524; *Price v. Jones*, 105 Ind. 543, 545; *Johnston v. Smith*, 86 N. C. 498, 501; *Van Norman v. Barbeon*, 54 Minn. 388, 393; *Gore v. Mason*, 18 Me. 84, 86; *Lambert v. Heath*, 15 M. & W. 486; *Cheale v. Kenward*, 3 DeG. & J. 27, 31; Benjamin on Sales (Corbin's ed.), p. 542; Pollock on Cr. P. P. 172, 174.

Benjamin, where cited, states the following as his conclusion: "But there is not a failure of consideration when the buyer has received that which he really intended to buy, although the thing bought should turn out to be worthless."

And Pollock concludes a discussion of the point thus: "The principle of the cases may be summed up in the statement made in so many words by the judges in more than one of them, that the promisor has got all that he bargained for." See also 6 A. & E. Ency. of Law, 780.

The expectation of defendant that he would be elected a director of the bank, the qualification for which, by law, is the ownership of at least ten shares of stock, is of no consequence. He could not have become a director save by election of his fellow shareholders, nor could he qualify without discharging all liens upon his stock. R. S., Sec. 5147.

Passing by the question whether such expectation could form a part of the contract of purchase, it does not appear from the facts alleged, that it actually entered into the agreement of the parties. *Philpot v. Gruninger*, 14 Wall. 570, 577. The following language of Mr. Justice Strong, in that case, is quite applicable here: "It is not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but

neither the expectation nor the result is, 'the cause or meritorious occasion requiring a mutual recompense in fact or in law.'"

The decisions cited in support of the appellant's contention do not, upon the facts of their foundation, maintain a contrary doctrine to that enounced.

In *Williams v. Nichols*, 10 Gray, 83, there was a total failure of consideration. The widow of an intestate gave her note to his creditor upon the assumption that assets subject to the debts of intestate had, or would, come into her possession. It transpired that there were no such assets. As was said by the court, it was clear that the widow derived no benefit from the transaction and the creditor sustained no damage.

The facts of *Schroeder v. Fink*, 60 Md. 436, are substantially the same. In *Clemshire v. Bank*, 53 Ark. 512, the note sued on was given in purchase of a telephone equipment, etc., which could not be operated without infringing an outstanding patent.

The doctrine of that case is the same as in the numerous cases which hold that a note given for an interest in or under a void patent is without consideration, as in *Harlow v. Putnam*, 124 Mass. 553, and others that might be cited. But there is an established distinction between such a promise and one given in exchange for a right under a valid patent which, however, proves to be without value, as in *Nash v. Lull*, 102 Mass. 60, 62, and others before cited.

4. The last question in the case is whether the affidavit states a defense of fraud in procuring the purchase of the stock and the execution of the note.

Before proceeding to its determination, it is proper to observe, that whilst courts will not inquire into the adequacy of the consideration alone, its inadequacy may, in connection with other things, become of importance as a circumstance tending to establish fraud where the validity of the contract is in dispute upon that ground.

The only specific charge of fraud is in the paragraph following those that have been mentioned before, as follows:

“I further aver that the bank, nor was such and I expect to show intention of the said or tender me such fraudulent representation above set forth.” When the stock was worth ten shares, which he contracted to purchase of fraudulent misrepresentation of financial condition of the bank without inquiry into the value of the stock by purchase of the stock by membership of the board of directors and by the interest of the bank in the inability of the bank to pay dividends to the stockholders when made upon which he had a controlling interest. The Directors are not charged with the duty of protecting the holders of the capital stock, as we have seen, the stock is to own unincumbered and not have become a lien on the property of the bank elected.

There remains, then, the question of the propriety of the action, but that of the propriety of the action, as we have seen, is not sufficient.

The court did not find fault with the action, notwithstanding the fact that the action was affirmed, with costs.

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ACCOUNTING. See Pr
ADEQUATE REMEDY
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PRACTICE.

ADMINISTRATORS. S

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AFFIDAVITS. See AF

AFFIDAVITS OF DEF

1. Where an affidavit of
an open account,
grounds stated in t
count for a certain
ment in this court
overruling the plai
claimed by the def
admission, the judg
out regard to the s
case stands upon th
fendant's affidavit.
2. Affidavits of defense
should be construed
cision as to meet te
allege facts indicati
substantial legal de
good faith of the d
D. C. 28; Bailey v.
Bogan, 6 id. 449; C
id. 289. Brown v.
3. An affidavit of defens
issory note is insu
to the bank in part
the representation
would be made a
liquidation before t
original note; that

AFFIDAVITS OF DEFENSE—*Continued.*

all its depositors and other creditors; that at the time of the purchase, the shares of stock, as affiant is informed and believes and expects to show at the trial, were of no value and have been of no value since; that affiant was not made a director or offered the position, and that he expects to show at the trial that it was never the intention of the bank or those in charge thereof to offer him such a position, but that he was induced by such fraudulent representations to enter into the arrangement set forth: *Id.*

ALIMONY. See **DIVORCE**, 1.

AMENDMENT OF ANSWER. See **APPELLATE PRACTICE**, 1, 2.

APPEALABLE ORDERS. See **APPELLATE PRACTICE**, 4, 5; **INJUNCTIONS**, 3.

APPEAL BONDS. See **APPELLATE PRACTICE**, 5, 6, 7.

APPEALS. See **APPELLATE PRACTICE**; **INJUNCTIONS**, 3.

APPEALS, DISMISSAL OF. See **APPELLATE PRACTICE**, 4, 6, 8, 9, 11.

APPELLATE PRACTICE. See **CRIMINAL LAW**, 8, 9; **DIVORCE**, 2; **EQUITY**, 1; **INJUNCTIONS**, 1, 3, 4, 6.

1. The adjudication of this court upon an interlocutory appeal from a decree for an accounting in favor of the complainant, is so far conclusive and binding upon the lower court as to preclude the granting by that court thereafter of leave to the defendant to amend its answer and to reopen the cause by taking additional testimony in support thereof; but upon a special application made for that purpose, leave may be granted by this court, under such circumstances, to so file an amended answer and reopen the case. *Farrow v. Bicycle Co.*, 101.
2. The showing made in support of an application or suggestion that this court, after its affirmance of an interlocutory decree in favor of the complainant for an accounting, permit the defendant to file an amended answer to the bill of complaint and take additional testimony in support thereof, upon the grounds that the complainant fraudulently concealed the existence of a certain patent from the defendant, his assignee of an application for a patent, and that the defendant was under a misapprehension as to the nature of the suit and complainant's claim, *held* insufficient to call for such action by this court. *Id.*
3. In construing an opinion of the court, the expressions contained therein are to be construed with reference to the subject-matter under consideration. *Id.*
4. An appeal raising the question as to which party should pay costs which had accrued in the court below, prior to a former appeal, in a suit by one party to recover from another a certain sum of money to which both made claim by virtue of assignments, *dismissed* upon the ground that the matter was within the discre-

APPELLATE PRACTICE — *Continued.*

tion of that court, whose order in the premises was not appealable. *Insurance Co. v. Larnier*, 147.

5. Money deposited in the court below in lieu of an appeal bond and to operate as security for the costs of appeal only and not as a *supersedeas* of the judgment appealed from, cannot properly after the dismissal of the appeal be subjected by an order of that court to the payment of the judgment and costs which have accrued in the court below; and an appeal lies to this court from an order of that court granting a motion by the judgment creditor so to subject such deposit and overruling a counter-motion by the judgment debtor to direct the clerk to pay the money so deposited to his attorney, to whom it belongs, and the appeal is properly taken in the name of the judgment debtor; *Associate Justice MORRIS dissenting. Mitchell v. Evans*, 254.
6. An appeal to this court will not be dismissed upon the ground that the appeal bond was approved by one of the justices of the lower court without notice having been first given to the appellee to show cause against the approval; Rule X of this court not requiring that such a notice be given as a prerequisite to the approval of the bond by the lower court. *Richards Brick Co. v. Rothwell*, 516.
7. Under Rule XV of this court requiring an appellant to file a transcript of the record in this court within forty days from the time of the appeal entered and perfected in the court below, unless such time be extended by that court, the forty days, in case of an appeal by the District of Columbia, begins to run from the day that the appeal is entered and not from the day of the approval of the appeal bond, as in ordinary cases, as the District of Columbia is not required under the law to give an appeal bond for costs or to stay execution. *District of Columbia v. Roth*, 547.
8. An order of the lower court extending the time within which to file a transcript of the record on appeal to this court, passed after the expiration of the forty days within which such transcript must be filed under Rule XV of this court, is erroneous, and an appeal docketed in this court under such circumstances will be dismissed. *Id.*
9. Where an order of the court below extending the time for the filing of the transcript in this court in the case of an appeal by the District of Columbia was not applied for and obtained until after the expiration of the forty days within which a transcript of the record must be filed in this court, such failure will not be excused by the fact that it was due to an oversight on the part of an assistant to the attorney for the appellant, who had been directed to procure such order within the prescribed time, but had neglected to do so, and such an appeal will be dismissed. *Id.*
10. The rules of this court regulating the matter of appeals and the preparation of the same for hearing have the force of law and are

APPELLATE PRACTICE — *Continued.*

binding upon the court and suitors and those who represent suitors and cannot be dispensed with by the court to meet the apparent hardship of any particular case, in the absence of fraud. *Id.*

11. An appellee, to defeat an appeal, would not be allowed to set up a rule of this court requiring a transcript of the record on appeal to be filed in this court within a prescribed time, where the filing of the transcript within such time was prevented by the fraud or contrivance of the opposite party, or by the contumacy of the clerk, without any want of diligence on the part of the appellant. *Id.*

ARBITRATION AND AWARD. See **CONTRACTS**, 4; **EQUITABLE LIEN**, 2, 3.

ARMY OFFICERS, DISMISSAL OF. See **MILITARY LAW**.

ASSIGNMENT OF GOVERNMENT CLAIMS.

There is nothing in section 3477, R. S. U. S., rendering void all transfers and assignments made of any claim upon the United States, or of any part or share thereof or interest therein, unless executed in a certain manner, that will prevent any court of competent jurisdiction as to the subject-matter and parties from making such orders as may be necessary and appropriate to prevent one who has a claim for money against the Government from withdrawing the proceeds of such claim from the reach of his creditors; provided such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the Government, nor in any wise obstruct any action that such officer may legally take under the statutes relating to the allowance or payment of claims against the United States; *following* *Manning v. Ellicott*, 9 App. D. C. 71, and *Marble Co. v. Burgdorf*, 13 id. 506. *Sanborn v. Maxwell*, 245.

ASSIGNMENTS OF PATENTS. See **PATENTS**, 20.

ATTORNEY AND CLIENT. See **EQUITABLE LIEN**.

AUCTION SALES. See **MEASURE OF DAMAGES**, 3.

AWARD. See **CONTRACTS**, 4; **EQUITABLE LIEN**, 2.

BANKS. See **NATIONAL BANKS**.

BILLS AND NOTES. See **PROMISSORY NOTES**.

BOVA FIDE PURCHASER. See **PROMISSORY NOTES**, 1, 2, 3.

BONDS. See **APPELLATE PRACTICE**, 5, 6; **EXECUTORS AND ADMINISTRATORS**, 2; **JOINT OBLIGATIONS**.

Sureties on bonds given by government contractors as required by the act of Congress of August 13, 1894 (28 Stat. 278), providing that every such contractor before commencing work shall give a bond conditioned upon the payment of all persons supplying ma-

BONDS — *Continued.*

terial and labor in
equity to interpose
the contract price
terialmen and labor
and preference given
of the sureties cau
tion on the part
their general credit

BONDS, ACTIONS ON. OBLIGATIONS.

BUILDING CONTRACTS BUILDING REGULATIONS

1. Where the proprietor
between his store and
applying for or obtaining
is properly convicted
the building regulations
construction, and in
regulations, which
whether an intended
formal permit. *M.*
2. Section 34 of the building
or more dwelling-houses
which they are to
house shall have a
in each case by the
ing regulation with
izing the Commission
and the Commission
owner of a lot the
inches deep, a permit
fusal is based solely
tions and upon sections
of lots, which sections
into lots not less than
Farlane v. Miller, 5
3. Where the proposed building
form in respect of
building regulation
to issue the permit
act required of the
forced by the writ
13 App. D. C. 38.

BURDEN OF PROOF.

CALLINGS AFFECTED WITH PUBLIC INTEREST. See **LEGISLATIVE REGULATION OF CALLINGS.**

CAPITAL STOCK, LOAN UPON SECURITY OF. See **NATIONAL BANKS.**

CERTIORARI. See **JUSTICES OF THE PEACE, 3.**

1. The justice of the peace is properly the sole respondent, and alone is competent to make a return, to a writ of *certiorari* issued to compel him to bring up to the Supreme Court of this District his record in a cause in which the petitioner for the writ claims he has acted or is acting without jurisdiction, and it is improper to make a party to the cause a party respondent to the petition for the writ. *Chamberlain v. Edmonds*, 332.
2. While affidavits may properly be incorporated into a petition for a writ of *certiorari* from a superior to an inferior tribunal, or made part thereof, and may similarly be annexed to a return, independent affidavits which constitute no part of either the petition or the return, are improper in such proceedings, and when filed will not be considered. *Id.*

CHARGE TO JURY. See **CRIMINAL LAW, 18, 20.**

CHILDREN. See **INFANTS.**

CIVIL SERVICE, FRAUD UPON. See **HABEAS CORPUS, 3.**

CLAIMS AGAINST THE GOVERNMENT, ASSIGNMENT OF. See **ASSIGNMENT OF GOVERNMENT CLAIMS.**

COLLATERAL ATTACK. See **CRIMINAL LAW, 6, 7; HABEAS CORPUS, 1, 2.**

COLOR OF TITLE. See **EJECTMENT, 1.**

COMMITTING MAGISTRATE. See **HABEAS CORPUS, 2, 3.**

COMMON CARRIERS. See **RAILROADS, 1.**

COMPENSATION. See **INJUNCTIONS, 2.**

CONDEMNATION OF LAND. See **INJUNCTIONS, 2.**

CONFESSIONS. See **CRIMINAL LAW, 18, 20.**

CONSIDERATION. See **AFFIDAVITS.**

CONSTITUTIONAL LAW. See **MUNICIPAL ORDERS AND REGULATIONS, 2; TELEPHONE SERVICE, 3.**

CONSTRUCTION OF STATUTES. See **STATUTORY CONSTRUCTION.**

CONTRACTORS. See **CONTRACTS, 4, 5.**

CONTRACTS. See **BONDS; CORPORATIONS, 1; EQUITY, 3; MEASURE OF DAMAGES, 1; PRIORITIES; RAILROADS, 1; SPECIFIC PERFORMANCE.**

1. Where partners sell their retail grocery business, with a joint obligation not to enter the same business within a limited area and time, and cease to be partners from the time of sale, it does not require

CONTRACTS — *Continued.*

the joint act of both obligors to constitute a breach of the obligation, but its violation by one is a violation by both, for which both are and each is liable to the obligee. *Love v. Stidham*, 306.

2. In order to show breach of an obligation by the vendors of a retail grocery store and business, not to engage in the same business within a limited area and time, it is not necessary for the vendees to show that the vendors retailed all of the articles that had been kept in and retailed from the store sold to the vendees; but only that a material and substantial part of such articles were retailed and sold by the vendors within the prescribed limits, provided that the business so conducted comes within the definition of a retail grocery business; and the vendors are liable if they serve customers within such limits, although they may have no residence, shop, store or place of business therein. *Id.*
3. Where the vendors of a retail grocery business and store, from which was sold, among other things, butter, cheese, eggs and poultry, at the time of the sale, covenanted with the vendees not to engage in the retail grocery business within a limited time and area, and the vendees, in an action against the vendors to recover damages for breach of the covenant, show that one of the defendants, since the sale, carried on a business of selling such articles within the prescribed limits, such evidence is of a nature proper to be submitted to the jury upon the question as to whether a breach of the covenant had been committed, and if so, as to the *quantum* of damages; what constitutes a retail grocery business being, to a large extent, a question of fact. *Id.*
4. Where one article of a building contract provides, that in case of dissent by either party from the award of the architects as to allowances for alterations, submission shall be had to arbitrators, and another article provides that the owner shall provide all labor and materials not included in the contract in such manner as not to delay the material progress of the work and, in event of failure so to do, thereby causing loss to the contractor, that he will reimburse the contractor for such loss, and that the amount of such loss shall be fixed and determined by the architects or by arbitration, as provided for in the first-named article, an award by the architects or by arbitrators is not a condition precedent to the maintenance by the contractor of an action against the owner for a breach of the provisions of the second article. *Fontano v. Robins*, 402.
5. One who, with the approval of church authorities engaged in the construction of a church building, undertakes to provide the interior construction of a chapel to be connected with the church, and who, in furtherance of such undertaking, enters into a contract with another for such work, which contract provides that "the owner agrees to provide all labor and materials not in-

CONTRACTS — Continued.

cluded in this contract in such manner as not to delay the material progress of the work, and in event of the failure so to do, thereby causing loss to the contractor, agrees that he will reimburse the contractor for such loss;" thereby takes the place of the real owner for the purposes of the contract, and becomes an absolute guarantor of the necessary construction preliminary to the commencement of the other's work. *Id.*

6. A contract whereby the owner of phonograph and graphophone patents grants to another the exclusive right to lease the instruments to the public at specified rates within a designated territory, the property in the instruments to remain in such owner, is not invalid in itself as seeking to impress upon a chattel or personal property a qualified ownership inconsistent with the freedom of transfer and rights of possession, nor does it involve a violation of public policy in seeking to restrain the freedom of sale and transfer of a patented article. *Whitson v. Phonograph Co.*, 565.

CONTRIBUTORY NEGLIGENCE.

Where a woman, on alighting from a street car, waited for the car to start and then passed in the rear to a parallel track, where she was struck and injured by a car coming in the opposite direction and running about ten miles an hour, and it appears that she was familiar with the place and knew that a car might pass at any moment, that the track was practically straight and unobstructed for several hundred yards, that one looking up the track for the coming car could not have failed to see it, and that it was not possible for the car to traverse the space along which it was visible, between the time she should have looked for it, as she passed from one track to the other, and the moment when she stepped upon the rail and was struck, she was guilty of contributory negligence *per se*, and cannot recover for her injuries, even though she testifies that she did look to see whether a car was approaching along the track where she was struck, and did not see one coming. *Harten v. Railway Co.*, 260.

CORPORATIONS. See TELEPHONE SERVICE, 1, 3.

Contracts of a corporation relating to loans, supplies, royalties and services are incidents of corporate existence and franchises; and all persons contracting with a corporation in those particulars do so subject to the dissolution of the corporate existence or the termination of special franchises by limitation, by judicial decree or by repeal where that power exists. *Manning v. Telephone Co.*, 191.

COSTS. See APPELLATE PRACTICE, 3; PROBATE PRACTICE, 1.

COUNSEL FEES. See EXECUTORS AND ADMINISTRATORS; PROBATE PRACTICE, 1.

COUNTS, MISJOINDER OF.
COURTS. See JUDICIAL NOT
COURTS-MARTIAL. See MI
COVENANTS. See CONTRAC
CREDITORS' SUITS. See E
CRIMINAL LAW. See HABE

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1. It is not error for the tri
prayer for the defense t
not justify the taking o
the deceased toward the
fore the killing, are j
whether the accused ac
other prayers granted f
matter by instructing tl
and words of the deceas
the accused at the time
152.
2. A prayer for instruction o
in which the defense is
rejected, which states t
have a reasonable doub
of the killing had in h
cused is entitled to the
3. Where, in a homicide ca
ceased were rival lovers
shortly before the killin
had been car-riding toge
and said to the deceased
be successfully contende
to support a prayer for
jury believe that the ac
ceased, and in the prog
the latter to save himse
defendant cannot justify
of self-defense. Id.
4. A prayer for instruction g
that if the jury believe
speak with him for the j
in order that he might s
of the defense of self-c
stroke while in danger
hands of the deceased, c
ence from an inference.
5. *Quære*, whether the act of
prosecutions in the polic
mation under oath, is r

CRIMINAL LAW — *Continued*

- viding "that prosecutions in the Police Court shall be by information by the proper prosecuting officer." *Latney v. United States*, 265.
6. By appearing and pleading to an information for petit larceny in the police court, in which information it is alleged that it is made on the oath of a person named therein, and submitting to be tried thereon without objection, the defendant admits the validity and sufficiency of the information, and, if convicted, cannot afterwards, when indicted for petit larceny, as a second offense, be heard in such collateral proceeding to deny the legal sufficiency of the information upon the ground that it was not sworn to, or to claim that his arrest for the first offense was illegal; *Associate Justice SHEPARD dissenting. Id.*
 7. A judgment of conviction of the police court of this District based upon an information alleging that the defendant is charged upon the oath of a person named therein, is not a nullity, under the act of Congress of June 17, 1870, requiring the information to be under oath, although there is no separate affidavit made by the prosecuting witness or some other person possessing knowledge of the facts, and a defendant in custody under such a judgment is not entitled to be released upon *habeas corpus* proceedings; *following Latney v. United States, ante, p. 265; Associate Justice SHEPARD dissenting. United States v. Davis*, 280.
 8. Under Rule V of this court, requiring that a transcript on appeal shall show in the caption nothing more than the title of the case, the names of the parties in full and the time of the commencement of the proceeding, it will be presumed that all proceedings prior to the filing of an indictment set forth in such a transcript were regular, and such presumption will continue until rebutted by facts and conditions properly presented in a bill of exceptions. *Lanckton v. United States*, 348.
 9. Where the transcript of the record on appeal, in a criminal case, shows that the grand jury was empaneled at a regular term; that a foreman was duly appointed and that the indictment upon which the accused was tried was returned in open court, indorsed "a true bill," over the signature of the foreman, it must be presumed that the grand jury empaneled was the grand jury required by the Constitution and the law, and that the true bill returned in open court was concurred in by the requisite number of the grand jurymen; and that the foreman's name, as written in the indictment, contains only the initial of his given name, while the minutes recite his full given name, is a fact of no consequence. *Id.*
 10. The British Statute of 1 Hen. V, ch. 5 (A. D. 1413), requiring every indictment to set forth "the estate, or degree or mystery of the defendant," and to aver "the town, hamlet or place or county in

CRIMINAL LAW — *Continued*

which the defendant is or was conversant," is not in force in this District. *Id.*

11. An indictment for murder which alleges that the crime was committed in the District of Columbia, and in a certain house situated therein, is not insufficient because it omits to allege the precise locality of the house. *Id.*
12. It is not error for the trial court, in a murder case, to instruct the jury that it is not necessary for the prosecution to prove a motive, but that absence of proof of motive may be considered as a circumstance in favor of the accused. *Id.*
13. It is not error for the trial court in a murder case to refuse a prayer for instruction by the accused to the effect that if it were probable that the deceased came to her death from any other cause whatever than from violence inflicted on her by the accused, the jury should find him not guilty, where, in addition to a general charge showing the necessity of proof beyond a reasonable doubt, the court instructs the jury, at the request of the accused, that if the death of the deceased can be accounted for on any other hypothesis whatever than that she came to her death as a result of injuries inflicted by the accused, it is their duty to acquit him. *Id.*
14. The refusal of a trial court to grant a prayer for instruction by a defendant indicted for murder to the effect that if the jury find the accused was intoxicated when the offense was committed they might take the fact of intoxication into consideration in determining the grade of punishment which should be inflicted, if error at all, is not prejudicial error, where the accused is convicted of manslaughter only. *Id.*
15. The voluntary intoxication of a person accused of a crime cannot be considered in determining the character of the crime committed, voluntary intoxication being neither an excuse or palliation for crime, *following Harris v. United States*, 8 App. D. C. 20. *Id.*
16. An indictment in which a count for theft is joined with a count for embezzlement will not be held defective on appeal where the same evidence was relied upon to establish each and the defendant could not, therefore, have been misled or prejudiced in the preparation of his defense; especially where, at the trial, the count for embezzlement was abandoned by the prosecution. *Davis v. United States*, 468. *i*
17. An indictment for the theft of money, under section 1158, R. S. D. C., is sufficient in its description of the stolen money, which describes it as "certain securities and obligations of the said United States, current as money, and being in the national currency and money of the said United States, of the value in the aggregate of one thousand dollars, the respective kinds, descriptions, denominations and values whereof the grand jurors aforesaid have no

CRIMINAL LAW — *Continued*

- means of ascertaining and, therefore, cannot give, of the goods, chattels and moneys of"—(naming the owner); and testimony that there were some fifty-dollar bills among the stolen money, the whole consisting of such currency of the United States as a certain grocery company took in over its counter in the transaction of its ordinary business, is sufficient to support the indictment. *Id.*
18. The portion of the charge of a trial court in a prosecution for theft, relating to the testimony as to an alleged confession by the accused, and the effect to be given to it by the jury, reviewed and held to contain error prejudicial to the accused. *Id.*
 19. *Quære*, whether the courts of this District have jurisdiction of the offense where a theft is committed in a neighboring jurisdiction and the stolen property thereafter brought here. *Id.*
 20. Where, in the prosecution of an express messenger for the theft of a package of money intrusted to him, in Atlanta by his employer, the express company, to be delivered by him in Washington, the Government made no attempt to prove anything relating to the actions of the defendant on the train between those places, the only testimony upon the subject being that offered by the accused, and nothing was developed from the evidence to show what opportunities the accused had to leave the train temporarily, or whether he in fact did so, and he was not himself interrogated thereon, it was held to be error prejudicial to the accused for the trial court to charge the jury, first, that they might infer from all the facts and circumstances, including an alleged confession by the accused, that he feloniously took the package somewhere on the way, and, thereafter, that they might "infer from such facts that he brought it with him into the District, in the absence of proof to the contrary," such a charge authorizing a presumption upon a presumption or an inference from an inference alone, and imposing upon the accused the burden of disproving or overcoming the final inference. *Id.*

CUSTODY OF INFANTS. See INFANTS.

DAMAGES. See CONTRACTS, 1-3; MEASURE OF DAMAGES; SURFACE WATERS, 2.

DECREE, MODIFICATION OF, ON APPEAL. See DIVORCE, 5.

DEDICATION.

Where the owner of land agrees with an adjoining owner to dedicate a portion of it for use as a public street, and the latter records a plat showing such dedication, and the municipal authorities enter upon the part so dedicated and grade it, such dedication thereby becomes irrevocable and the first owner is estopped to thereafter disclaim the dedication and resume exclusive adverse possession;

DEDICATION — *Continued.*

following *Lansburgh v. District of Columbia*, 8 App. D. C. 10;
District of Columbia v. Robinson, 14 id. 512; S. C., 180 U. S. 92.
Oettinger v. District of Columbia, 375.

DEED OF TRUST NOTES. See PROMISSORY NOTES, 2, 3.

DEEDS OF TRUST. See EJECTMENT, 3, 4.

DEMURRER FOR LACHES. See LACHES, 1, 2.

DEPOSIT FOR COSTS, ENFORCEMENT OF JUDGMENT AGAINST.
 See APPELLATE PRACTICE, 5.

DEPOSIT IN LIEU OF APPEAL BOND. See APPELLATE PRACTICE, 5.

DESERTION. See DIVORCE, 3, 4.

DISAGREEMENT OF JURY. See JUSTICES OF THE PEACE, 1-3.

DISCONTINUANCE. See JUSTICES OF THE PEACE, 2.

DISMISSAL OF BILL WITHOUT PREJUDICE. See DIVORCE, 5.

DISSOLUTION. See CORPORATIONS, 1.

DISTRIBUTION AMONG CREDITORS. See EQUITY, 3; EQUITABLE
 LIEN, 4; PRIORITIES.

DITCHES. See SURFACE WATERS, 1, 2.

DIVORCE.

1. The evidence in a suit for divorce reviewed and *held*, reversing the decree of the court below, sufficient to sustain the charge of adultery, made against the defendant. *Gibson v. Gibson*, 72.
2. A motion by the appellant to amend a decree of this court reversing a decree of the court below dismissing a bill for divorce, so as to direct the lower court, in entering a decree in favor of the complainant, to allow her arrearages of alimony to the date of the decree as well as permanent alimony and counsel fees, *overruled*. *Id.*
3. To convert the continuation by the wife of a voluntary separation had upon the demand of the husband, who refused longer to live with her upon her confession that she no longer loved him but was willing to remain with him "for appearance sake," into the willful desertion and abandonment for which under the statute an absolute divorce may be granted, it is at least incumbent on the husband to show that he has, in a conciliatory manner and in perfect good faith, invited her return without condition. *Woolard v. Woolard*, 326.
4. Where shortly after a husband and wife separate upon his demand, the husband writes to his wife and in cold and formal terms invites her to return and resume her full duty as his wife, together with the love she should have for him, with no assurance of continued affection on his part, or indication of regret that he insisted upon their separation, the general tone of

DIVORCE — *Continued.*

being one of complaint and containing a reproach for which there is no foundation in the evidence as to the causes of the separation, and the wife does not return, the husband will not be entitled to a divorce for desertion. *Id.*

5. A decree in such a case dismissing the bill of complaint, modified so as to show a dismissal without prejudice, and, as modified, affirmed. *Id.*

DOWER, ASSIGNMENT OF. See EJECTMENT, 2.

DRAINAGE. See SURFACE WATERS, 1, 2.

EJECTMENT.

1. Where the defendant in ejectment relies not only upon a good record title, but also upon a possessory title, a marshal's deed and tax deeds to one under whom he claims, are admissible in evidence as constituting color of title, whether they are void or not. *Mackall v. Mitchell*, 58.
2. A small triangular parcel of land left for access to the main door of a building, and necessary for such access, is to be regarded, in contemplation of law, as covered by the building, and twenty years' adverse possession of the building and use of the parcel of land as a means of access thereto, will be sufficient to give a good possessory title to such parcel, especially where the plaintiff in ejectment, seeking to recover such parcel of land, planned and erected the building and made the triangle the only place of access to the principal, if not only, door of the building opening on the street. *Id.*
3. Whether the heirs-at-law of a deceased mortgagor, who had remained in possession of the mortgaged premises under an express covenant, or by apparent sufferance of the mortgagee, can maintain ejectment against a stranger having no claim under either the mortgage or the mortgagee, *quære*. *Wilkes v. Wilkes*, 90.
4. Where no dower has been assigned to the widow of a deceased grantor in a deed of trust, which conveyed the premises described therein to trustees to secure the payment of the deed of trust indebtedness, with the right in the grantor to remain in possession until default in the payment of the debt, and she occupies the premises as a home, her husband having left no other estate, his heirs-at-law cannot maintain an action of ejectment against her to recover possession of such premises; especially where the widow is also the administratrix of her deceased husband and, as such, the holder of the term of years created by the covenant in the deed of trust allowing him to remain in possession until default in payment of the deed of trust debt, the technical effect of which covenant, operating by way of redemption, was to create a legal estate for years in the grantor. *Id.*

EMBEZZLEMENT. See CRIMINAL LAW, 16.

EMPLOYER AND EMPLOYEE. See PATENTS, 13, 14.

EQUITABLE ASSIGNMENTS. See EQUITABLE LIEN.

EQUITABLE LIEN.

1. An oral agreement to pay attorneys a specific sum as compensation for services to be performed in securing an appropriation from Congress, which sum is to be, to that extent, an interest in the money to be appropriated, will create a charge upon the proceeds of such an appropriation, enforceable as an equitable assignment or lien. *Sanborn v. Maxwell*, 245.
2. Parties holding such a lien, and in favor of whom an award of a specific sum of money has also been made in proceedings under an agreement to arbitrate, may maintain a creditor's bill in equity upon such award without first reducing their demand to judgment, the award, if regularly made, being as conclusive of the demand, both in respect of its validity and amount, as a judgment would be; or being, at least, sufficient foundation for the enforcement of their equitable lien. *Id.*
3. Where one of two parties has an equitable lien upon a fund to be realized by the other for services to be performed, and in arbitration proceedings between the parties to determine the amount due for such services, is awarded a sum certain for such services, the lien is not merged in the award, but remains enforceable for the full amount of the sum awarded. *Id.*
4. Where government contractors induce a third person to indorse their note in order to procure money to complete one of their several contracts under a promise to pay the note out of the money to be derived from such contract, the transaction will not constitute an equitable assignment so as to entitle the indorser to priority over other creditors of the contractors in a distribution by receivers of funds received by them upon the completion of all the contracts. *Richards Brick Co. v. Rothwell*, 516.

EQUITABLE SET-OFF. See EQUITY, 2.

EQUITY. See BONDS; EQUITABLE LIEN; ESTOPPEL; INJUNCTIONS; INTERPLEADER, 1, 2; LACHES, 1, 2.

1. Where a telephone subscriber by a suit in equity for an injunction sought to compel a telephone company to continue furnishing him telephone service at a rate fixed by statute, which was less than the former rate charged by the company and paid by him, and to restrain the company from removing its instrument from his place of business, and a large mass of testimony was taken by the parties to determine whether the rate as fixed by law was reasonable, and the lower court, while expressing the opinion that "proper remedy was by *mandamus*, considered the case on merits and dismissed the bill, and the defendant on appeal complainant to this court declined to raise the question, it was *held* that this court would not of

EQUITY — *Continued.*

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raise the question of jurisdiction, although upon consideration it might appear that the complainant had an adequate remedy at law. *Manning v. Telephone Co.*, 191.

2. A creditor having a claim *ex contractu* against another, not reduced to judgment, may maintain a bill in equity to set off such claim against a judgment on a claim *ex delicto* recovered against him by such other person, if the latter is insolvent; and equitable relief under such circumstances is not precluded where, at the time of the filing of such a bill, complainant has an action at law pending to enforce his claim, and, during the pendency of the equity proceedings, the action at law is dismissed for want of prosecution, such dismissal not constituting an adjudication of the claim so as to prevent further litigation of it; *distinguishing* *Droop v. Ridenour*, 9 App. D. C. 95. *Fedarwisch v. Alsop*, 318.
3. Where receivers of insolvent government contractors assume and carry out contracts of such contractors for the building of schoolhouses for the municipal government and life-saving stations for the Federal government, and in so doing use funds derived from the schoolhouse contracts in the completion of the life-saving stations, persons supplying material and work in the erection of the schoolhouses are not entitled to follow such funds or to have preference over the claims of persons furnishing work and material in the erection of the life-saving stations. *Richards Brick Co. v. Rothwell*, 516.
4. It is only in cases where a person advancing money to pay the debt of another stands in the situation of a surety or is compelled to pay it to protect his own rights, that equity will substitute him in the place of the creditor as matter of course without any agreement to that effect; but in other cases the demand of a creditor which is paid with the money of a third person and without agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguishable. *Id.*

EQUITY PLEADING AND PRACTICE. See APPELLATE PRACTICE; DIVORCE, 5; INJUNCTIONS, 1, 3, 4; INTERPLEADER, 1, 2.

ESTOPPEL. See CRIMINAL LAW, 6; DEDICATION; MARRIED WOMEN; TAX SALE CERTIFICATES.

Where, by a series of leases and renewals, land has been leased to a railroad company by trustees to whom it was devised in trust for the sole and separate use of a married woman for her life, and she has received the rent reserved, neither she nor the trustees, after the term created by the last lease has expired, will be permitted in equity to repudiate the leases because the life tenant failed to join in the execution of some of them, and because but one of the three trustees executed the last one, one of his co-trustees having been abroad and the other having resigned his

ESTOPPEL — *Continued.*

trust and been relieved and discharged therefrom. Railroad Co. v. Winslow, 438.

EVIDENCE. See CONTRACTS, 3; EJECTMENT, 1; MEASURE OF DAMAGES, 2, 3; PLEADING AND PRACTICE, 3-5; RAILROADS, 1; WILLS, 1, 2.

The common law (unlike the Roman law and the modern law of some countries and States derived or adopted therefrom), indulges no presumption of survivorship, whatever may have been the age, sex or physical condition of the respective persons who have lost their lives in a common disaster; but it requires evidence as the basis of its action. *Faul v. Hulick*, 9.

EXECUTORS AND ADMINISTRATORS. See JOINT OBLIGATIONS.

1. The Supreme Court of this District, holding a special term for Orphans' Court business, has the power to allow an executor who has acted in good faith, expenses incurred and paid by him in employing counsel to resist a *caveat* interposed before the will has been admitted to probate, as well as afterwards. *Tuohy v. Hanlon*, 225.
2. Objections by one of several defendants in an action on a bond against an executor and his sureties, that the declaration fails to state that the executor ever entered upon his office; or that the bond was ever delivered or approved by the Orphans' Court; or that assets ever came into the executor's hands wherewith to pay the claim of the plaintiff, or that there were any demand and refusal to pay, or that the Orphans' Court ever ordered the executor to pay — are immaterial, and, at most, constitute matters of defense which, if true, should be pleaded. *Blagden v. United States*, 370.

EXPERT TESTIMONY. See MEASURE OF DAMAGES, 2.

FOLLOWING TRUST FUNDS. See EQUITY, 3.

FOREIGN CORPORATIONS. See TELEPHONE SERVICE, 1, 3.

FOREIGN LAWS, PROOF OF. See MARRIED WOMEN, 1.

FRAUD. See AFFIDAVITS OF DEFENSE, 3; APPELLATE PRACTICE, 10, 11; INJUNCTIONS; LACHES, 1, 2.

FRAUDULENT COVEYANCES. See LACHES, 2.

GOVERNMENT CONTRACTS. See BONDS; EQUITY, 3; PRIOR

GRAND JURY. See CRIMINAL LAW, 9.

GUARANTY. See CONTRACTS, 5.

HABEAS CORPUS. See CRIMINAL LAW, 7; INFANTS

1. The writ of *habeas corpus* cannot be made to pro writ of error, and where a party by such charged from imprisonment under a jud

HABEAS CORPUS — *Continued.*

court of competent jurisdiction, he must clearly show that the judgment, for causes apparent upon its face, is an absolute nullity, as the question of errors or defects in the proceeding upon which the conviction is founded will not be entertained in a collateral proceeding by *habeas corpus*. *United States v. Davis*, 280.

2. In reviewing the action of a committing magistrate, on *habeas corpus* the courts may go into the merits of the case and where the evidence shows the order of commitment to be void, or that an offense could not have been committed, by reason of the undisputed facts, the prisoner should be released; but where the magistrate is shown to have acted in good faith and there is room for a trial court to hold that an offense has been committed by the petitioner, under any law, the order of the magistrate committing to jail for default in giving bail, is a proper and valid judgment, and should not be disregarded in a collateral proceeding. *Palmer v. Colladay*, 426.
3. Where a committing magistrate before whom a party was charged with attempting to defraud the United States by co-operating with a candidate for appointment in the Civil Service in making a false statement as to the eligibility of such candidate for appointment, held the prisoner to bail to await the action of the grand jury, a preliminary examination having been waived, an order of the lower court discharging the prisoner from custody upon *habeas corpus* proceedings instituted by him, was reversed upon the ground that the showing made before the Commissioner was of such a character as to justify his action. *Id.*

HOMICIDE. See **CRIMINAL LAW**, 1-4, 12, 15.

HUSBAND AND WIFE. See **DIVORCE**; **EJECTMENT**, 2; **INFANTS**, 2; **MARRIED WOMEN**.

INDICTMENT. See **CRIMINAL LAW**, 8, 9, 10, 11, 16, 17.

INFANTS.

1. Where the custody of children is involved, the courts do not act to enforce the rights of either parent, but to protect the interest and welfare of the children; *following* *Slack v. Perrine*, 9 App. D. C. 128, and *Wells v. Wells*, 11 id. 302. *Stickel v. Stickel*, 149.
2. An order in a *habeas corpus* proceeding instituted by a wife against her husband awarding the custody of their two-year-old child to the mother, against whom no charges were made showing that she was unworthy or incapable of giving the infant proper care, affirmed as not showing that the trial court erred in the exercise of its sound discretion. *Id.*

INFORMATIONS. See **CRIMINAL LAW**, 5, 6, 7.

INFRINGEMENT. See **INJUNCTIONS**, 5.

INJUNCTIONS. See ASSIGNMENT OF GOVERNMENT CLAIMS; EQUITY,
1; MUNICIPAL ORDERS AND REGULATIONS, 1.

1. Where a bill in equity by the maker of a promissory note to enjoin the issue of execution upon a judgment against him, obtained by the defendants as holders of the note by indorsement from the payee, states that the note was fraudulently procured from him by the payee and that he believes and expects to prove that the defendants had knowledge or notice of the fraud, but no facts are stated either upon personal knowledge or upon information reasonably sufficient upon which to base his belief, a temporary restraining order granted upon the filing of the bill is properly dissolved, especially where the defendants in their answers expressly deny any fraud on their part or any knowledge or notice of fraud by them. *Magruder v. Schley*, 288.
2. Where, under a lease of land to a railroad company, containing a provision which is not enforceable, giving the company the right to purchase the land for a specified sum, the company is given a license to enter upon the land and construct its road, and does so, an action at law by the lessor for the dispossession of the company will be enjoined in equity, if the company is willing to make compensation for the use and occupation of the land, such compensation to be fixed by condemnation proceedings. *Railroad Co. v. Winslow*, 438.
3. An order overruling a motion to dissolve a temporary restraining order granted *ex parte* and continuing the same, is in effect an order granting a temporary injunction, and is appealable, under section 7 of the act of Congress of February 9, 1893, creating this court; and such an appeal brings up the question of the propriety of the temporary injunction; *following* *Electric Lighting Co. v. Met. Club*, 6 App. D. C. 536, and *Parsons v. Hill*, 15 id. 532. *Macfarland v. Railroad Co.*, 456.
4. The fact that an electrical switch and appliances erected by a railway company without first obtaining the permission of the municipal authorities, as required by law, was installed for use in case of emergency only, and that no danger can result from temporarily enjoining the municipality from removing them, will not justify the continuance of a restraining order enjoining their removal until proof can be taken. *Id.*
5. Where the licensee of a former owner of phonograph and graphophone patents, having the right under his contract to lease phonographs and graphophones at specified rates within a designated territory, seeks to obtain a temporary restraining order enjoining a third party who has become the owner of the patents from infringing upon his rights within the territory designated, the fact that the licensee sells only graphophones and not phonographs, thereby discriminating against the latter, is not a ground for refusing the restraining order, although that fact might be availed of by

INJUNCTIONS — *Continued.*

appropriate proceedings to enforce or vacate the contract. *Whitson v. Phonograph Co.*, 565.

6. Where on an appeal from an order granting a motion for a preliminary restraining order, it appears that the opposition to the motion was made before answer filed and upon affidavits only, and that the complainant in his bill stated a case which entitled him to the restraining order, this court will not disturb the discretionary power exercised by the lower court and go into the merits of the case. *Id.*

INSTRUCTIONS TO JURY. See CRIMINAL LAW, 1-4, 12-14.

INTEREST. See USURY.

INTERLOCUTORY APPEALS. See APPELLATE PRACTICE, 1, 2.

INTERPLEADER.

1. A bill of interpleader is not maintainable by a stakeholder against the claimants of the fund in his hands when he has already contested his liability to them in an action at law and judgment has been rendered against him, and where there is nothing of an equitable character involved upon which the court of law was not competent to pass. *Tralles v. Metropolitan Club*, 588.
2. Where a stakeholder defends an action at law to recover the fund in his hands upon the ground that the fund belongs to other claimants who are not parties to the action, and judgment is rendered against him, the fact that such other claimants are parties to a bill of interpleader subsequently filed by him, will not add an element of equity to the controversy which will render the bill of interpleader maintainable. *Id.*

INTOXICATION. See CRIMINAL LAW, 14, 15.

INVENTIONS. See PATENTS.

JOINT OBLIGATIONS. See CONTRACTS, 1-3.

The plaintiff, in a suit on an executor's bond, against the executor and his sureties, by taking a judgment by default against the executor, does not thereby release the sureties from further liability, although in the declaration it is alleged that the bond is joint while, in fact, it is joint and several; *construing* sec. 827, R. S. *D. C. Blagden v. United States*, 370.

JUDGMENT. See HABEAS CORPUS, 2.

JUDICIAL DISCRETION. See INJUNCTIONS, 6.

JUDICIAL NOTICE.

The Supreme Court of this District is a court of general jurisdiction and its terms are fixed by law, of which this court is bound to take notice, and it is not necessary to the legality of the sessions of its several branches that the minutes should recite the appear-

JUDICIAL NOTICE — *Contin*

ance of the clerk and ma
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JURISDICTION. See *CRIMIN* *THE PEACE*, 1, 3.

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JURY, DISAGREEMENT OF. JUSTICES OF THE PEACE.

1. When a jury empaneled on the peace case, fail to a charge them, and the effect not to terminate the cause but to remit the parties was empaneled. *Chambe*
2. Failure by a justice of the p after a jury empaneled th will not operate to disc then at any time, upon m
3. Where, after the disagree upon demand of the def response to a motion by trial, the defendant obj overruling of the objectio its merits, without the i ment for the plaintiff, he is properly removable b being a demand for a ju mon and empanel anothe such trial be waived. *Id*

LABORERS AND MATERIAL TIES.

LACHES.

1. The defense of laches will i the bill clearly charges f ants have instituted the after their discovery of
2. An amended bill of complain certain real estate dated procurement of the deed l claimed, from an imbecil lent combination between fendants, and another p becile, after the latter's d at-law, the complainant

LACHES — *Continued.*

seizement by the defendants of papers from the files of the court in an equity cause involving the same real estate. Complainants stated that they only suspected the fraud within three years of the commencement of their suit, and had no actual proof of it until within one year. *Held*, reversing a decree dismissing the amended bill on demurrer upon the ground of *laches*, that it should not have been disposed of on demurrer, but that leave should be reserved to the defendants to make the defense of *laches* in their answer and at the hearing. *Id.*

LEASE. See **ESTOPPEL**; **TRUSTS AND TRUSTEES**.

It is not necessary to the validity of a lease of land that the lessee should have joined in its formal execution by signing it. *Railroad Co. v. Winslow*, 438.

LEGISLATIVE REGULATION OF CALLINGS. See **TELEPHONE SERVICE**, 1-3.

1. The exercise of the legislative power to regulate callings affected with a public interest, is not dependent upon notice and hearing and it will be presumed that the legislature, in a given case, acted with due knowledge and fair consideration of all the facts and circumstances of the situation. *Manning v. Telephone Co.*, 191.
2. One who invokes judicial relief against a statute regulating a calling affected with a public interest and fixing charges for services rendered, must show beyond a reasonable doubt that the enforcement of the statute will be destructive of property rights. *Id.*

LICENSE. See **INJUNCTIONS**, 2.

LICENSEE OF PATENT. See **PATENTS**, 20.

LIENS. See **BONDS**; **EQUITABLE LIENS**; **PRIORITIES**, 1, 2.

MANDAMUS. See **BUILDING REGULATIONS**, 3; **EQUITY**, 1; **MILITARY LAW**; **TAX SALE CERTIFICATES**.

MARKET VALUE. See **MEASURE OF DAMAGES**, 3.

MARRIED WOMEN. See **ESTOPPEL**; **HUSBAND AND WIFE**; **TRUSTS AND TRUSTEES**.

1. Where, in a suit by a married woman on a note payable to her, her uncontradicted testimony is that the money loaned was not acquired by gift from her husband, but was her separate property acquired from the sale of her real estate in Georgia, it will *probably* not be presumed, in the absence of proof of the law of Georgia relating to the property rights of married women, that the common-law rule which would make the proceeds of such a sale the property of the husband, prevails in that State; or that the husband's acquiescence to the wife's claim to the money after its receipt makes it hers by gift or conveyance from him, within the meaning of R. S. D. C., Secs. 727-729. *Richards v. Bippus*, 293.

MARRIED WOMEN — Continued.

2. Where one borrows money from a married woman and gives his promissory note for it, payable to her and not to her husband, and is given credit for payments made upon it, and has no pretense of set-off or counterclaim against the husband, he is estopped to deny her capacity to sue on the note for the sole purpose of avoiding payment of the debt. *Id.*

MASTER AND SERVANT. See **PATENTS**, 13, 14.

MATERIALMEN AND LABORERS. See **BONDS**; **EQUITY**, 3; **PRIORITIES**.

MEASURE OF DAMAGES.

1. Where the owner of a tract of land grants to a railroad company a right of way through her land sixty feet wide and three feet deep, thereby cutting the tract into two parts, and at the same time delivers her promissory note for \$500 to the company, in consideration of which the company agrees to construct and operate a railroad over the right of way and to run its cars thereon at certain specific hours day and night, and the company, after constructing the road and operating it for a time in accordance with the agreement, wholly abandons it and refuses further to operate it and run cars thereon, the measure of damages recoverable by the owner for the breach of the contract, is the actual loss she has suffered thereby, which is to be determined by the ascertainment of the value of the land to its owner with the railroad upon it and in operation and the value of the same land with the railroad abandoned and its operations ceased. *Railway Co. v. McDevitt*, 497.
2. In the absence of actual sales of the property, under such circumstances, it is proper to ascertain such value by the opinions and estimates of persons conversant therewith. *Id.*
3. In an action against the marshal for an unlawful seizure of goods under a writ subsequently quashed, in the absence of circumstances of oppression or willfulness, it is error for the trial court to permit the plaintiff to introduce evidence as to what the goods, bought by him to be sold at auction, would have realized at auction at the time of the seizure, and to instruct the jury that in ascertaining the damages they might take into consideration the amount the goods would have realized at auction if sold by the plaintiff in his usual course of business at the time of the seizure; the measure of damages being the market value of the goods at the time and place of seizure, less their market value at the time of their return. *Palmer v. Augenstein*, 511.

MERGER. See **EQUITABLE LIEN**, 3.

MILITARY LAW.

Where an officer of the army during the war with Spain, after having been acquitted by a court-martial of charges preferred against

MILITARY LAW — *Continued.*

him, was, by direction of his commanding general, retried by the court-martial on the same charges, and was convicted and dismissed from the service, and thereafter, peace having been declared, and its term of enlistment having expired, his regiment was mustered out and discharged, it was *held* that *mandamus* would not lie on his relation against the Secretary of War to compel the respondent to cause the relator to be mustered out and discharged. *Brown v. Root*, 239.

MISJOINDER OF COUNTS. See CRIMINAL LAW, 16.

"MONEY." See CRIMINAL LAW, 17.

MORTGAGE NOTES. See PROMISSORY NOTES, 2, 3.

MORTGAGOR AND MORTGAGEE. See EJECTMENT, 3, 4.

MOTIVE. See CRIMINAL LAW, 12.

MUNICIPAL ORDERS AND REGULATIONS. See BUILDING REGULATIONS.

1. Where the Commissioners of the District ordered a railway company to remove an electric switch and appliances, installed by it at the intersection of certain streets without having obtained permission to do so, and the company, in a suit for an injunction, obtained an order temporarily restraining the Commissioners from executing their official order, it was *held*, on an appeal from an order overruling a motion by the Commissioners to dissolve the restraining order, that, as it did not appear that they had exceeded their powers or abused their discretion or acted oppressively in ordering the removal of such construction, that the restraining order should be dissolved. *Macfarland v. Railroad Company*, 456.
2. A statute or regulation looking to the public interest and safety will be upheld by the courts unless it is plain that it has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law. *Id.*

MUNICIPAL RECORDS, RULE TO INSPECT. See PLEADING AND PRACTICE, 3-5.

MURDER. See CRIMINAL LAW, 1-4, 12-15.

NATIONAL BANKS. See AFFIDAVITS OF DEFENSE, 3.

One who purchases from a national bank a number of shares of its capital stock, paying part cash therefor and giving his promissory note for the balance of the purchase price, and leaving the shares of stock in the hands of the bank as collateral security for the payment of the note, cannot defeat a recovery by the bank upon the note upon the ground that section 5201, R. S. U. S. prohibits national banks from making any loan or discount on the security of the shares of its own capital stock, and from becoming the purchaser or holder of any such shares, unless such security or pur-

NATIONAL BANKS — *Continued.*

chase shall be necessary to prevent loss upon a debt previously contracted in good faith. *Brown v. Bank*, 598.

NEGLIGENCE. See CONTRIBUTORY NEGLIGENCE.

NEGOTIABLE INSTRUMENTS. See PROMISSORY NOTES.

NON-PROS, EFFECT OF. See EQUITY, 2.

NONSUIT. See PLEADING AND PRACTICE, 1, 2.

NOTES. See PROMISSORY NOTES.

NOTICE. See APPELLATE PRACTICE, 6; LEGISLATIVE REGULATION OF CALLINGS; PATENTS, 20.

OPINION EVIDENCE. See MEASURE OF DAMAGES, 2.

OPINION OF COURT, CONSTRUCTION OF. See APPELLATE PRACTICE, 3.

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1. No actual test of the practicability of a device is needed to constitute reduction to practice, where the device is itself complete and capable of practical use; but where the device made was crude and the inventor himself testifies that he did not regard it as

PATENTS — Continued.

- fit for practical use, it cannot be regarded as reduction to practice of the invention, although others made subsequently upon the same pattern were practical and successful. *Lindemeyr v. Hoffman*, 1.
2. Where, in an interference case, there is no satisfactory proof of actual reduction to practice by either party before the filing of their applications, the one who was first to conceive the invention and the first, by three days, to file his application, and so constructively reduce to practice, is entitled to an award of priority of invention. *Id.*
 3. On an appeal to this court in an interference case, the question is as to priority of invention and not as to patentability; and, therefore, where an interference is declared between a reissue application and a patent, a ruling of the Patent Office will be accepted as conclusive that the claims in issue were sufficiently apparent from the specifications and drawings in the original application and that they constituted part of the invention intended to be covered by the original patent. *Austin v. Johnson*, 83.
 4. Where a reissue application is involved in an interference with a patent, the application is to be regarded as a continuation of the original application, and the applicant is entitled to the date of his original application as the date of a constructive reduction to practice. *Id.*
 5. Where one of the parties to an interference claimed to have conceived the invention in February, 1895, but laid it aside and was doing nothing when his rivals entered the field in June, 1895, although he could have reduced the invention to practice either actually by making the device or constructively by filing an application at any time he desired, it was held he was lacking in diligence. *Id.*
 6. The party to an interference who was first to file his application is to be regarded as the senior applicant, although while it was pending his rival's application went to patent. *Miehle v. Read*, 128.
 7. Where it is shown that one of the parties to an interference conceived the invention in June, but did nothing until after his rival entered the field and filed an application in the following December, his only excuse being that he was engaged in other things which required his attention, while a two hours' conference with his attorney would have sufficed to have prepared his application for filing, and it also appears that he had had experience in patent matters and was not without means to prosecute his invention, such lack of diligence is shown as to defeat his claim to priority in an interference proceeding. *Id.*
 8. The rights of a party to an interference become fixed by the filing of his application in the Patent Office; and lack of diligence on his part in prosecuting his application in the Office has no bearing upon the question of priority. *Id.*

PATENTS — *Continued*

9. Where one of the parties to an interference appears to have so changed his claims as to cover an invention which he did not contemplate until after he saw his rival's patent, *quære*, whether (in view of *Bechman v. Wood*, 15 App. D. C. 484) he is entitled to make the claims in issue. *Id.*
10. The testimony in an interference case involving a photographic roller-holder reviewed, and it appearing that the senior applicant claiming prior conception and disclosure failed to show disclosure, except by the testimony of witnesses who, testifying four years after the event, claimed to have seen the roller-holder box, but not the interior of the box, and a drawing, while no one of them was shown to have any acquaintance with the photographic art or with any branch of it, or to have had any intelligent comprehension of the thing exhibited, and no means of fixing the time, and the applicant himself was the only one who testified as to the identity of the contents of the box; and it further appearing that the applicant, an inventor and patent attorney, and with abundant means, suppressed his invention and concealed the device for more than four years after he claimed to have reduced it to practice and produced it only after an interview with the attorney of his rival, it was *held*, reversing a decision of the Commissioner of Patents, awarding him priority, (1) that there was no disclosure, in the sense of the patent law, which must be made ordinarily to persons competent to understand and appreciate the alleged invention; and (2) that the presumption was that there was nothing more than an abandoned experiment. *Eastman v. Houston*, 135.
11. A concurrence of decision by all the tribunals of the Patent Office adverse to an appellant to this court upon a matter of fact renders it necessary for him to make out a very clear case of error in order to obtain a reversal; *following* *Hisey v. Peters*, 6 App. D. C. 68; *Hien v. Buhoup*, 11 id. 293; *Glenn v. Adams*, 12 id. 175; *Esty v. Newton*, 14 id. 50. *Howard v. Hey*, 142.
12. Where in an interference case involving priority of invention of a stamp-canceling machine, one of the parties to which filed his application February 17, 1890, and the other May 31, 1887, it appeared that the former, the junior applicant, completed and operated his machine upon letter mail in the Boston post-office for several days in 1883, and then after partly dismantling it, laid it aside and never again operated or tested it in public, while the testimony of two employees of the post-office, intended to show that it was successfully operated, was vague and indefinite, and the assignee of the junior applicant, who furnished the money for making the machine in 1883, although claiming to have subsequently employed another party merely to devise a new feeding device for the machine, caused applications covering the entire machine to be filed in the name of such other party, it was *held*,

PATENTS — *Continued.*

- that the testimony did not show reduction to practice, but a mere abandoned experiment on the part of the junior applicant; *following* *Beals v. Finkenbinder*, 12 App. D. C. 23; *Warner v. Smith*, 13 id. 111; *Traver v. Brown*, 14 id. 34; *Esty v. Newton*, 14 id. 50; *Fefel v. Stocker*, 17 id. 317; *Reichenbach v. Kelley*, 17 id. 333. *Id.*
13. In an interference case involving a match-making machine, where the question was not one of priority of invention, but one of originality, each party claiming to have conceived the invention which was embodied by them in a machine constructed in the shop of one of the parties, who was the employer of the other, and where the direct testimony upon the question of which party disclosed the invention was confined to the depositions of the parties themselves, it was *held* that the weight of the testimony was with the employer, the collateral circumstances showing that the latter was an expert machinist and well acquainted with match-making machines, while his employee had never invented anything and, until he entered his then employment, had never seen such a machine, and would not have known one if he saw it, and also that the latter refused on his examination to answer proper questions. *Miller v. Kelley*, 163.
 14. While, if an employee makes an invention wholly independent of his employer, the invention belongs to him, and does not inure to the benefit of the employer, when in the course of experiment by an employer with an invention, a device is suggested for its improvement which in itself would reach the dignity of independent invention, and a dispute arises between employer and employee as to its conception, the presumption is in favor of the employer, and it is incumbent on the employee to overcome that presumption by satisfactory proof. *Id.*
 15. Where an applicant in interference with another claims to have reduced his invention to practice in July, 1897, but it appears that thereafter, although he worked upon and procured patents for other closely-related inventions, he did nothing with the one in controversy until he filed his application in January, 1899, and in the meantime his rival entered the field, conceived and perfected the invention and filed his application for the device for which there seems to have been a demand by the public, the presumption is that that which is claimed to have been reduction to practice was no more than a mere abandoned experiment. *Adams v. Murphy*, 172.
 16. An application for a patent is properly rejected upon a reference to a patent granted three days before the application was filed, where the patent, although not describing or claiming the invention, has annexed to it a drawing showing the invention; the failure of the patentee to include the device among the claims of his own inven-

PATENTS — *Continued.*

- tion, implying either that he abandoned it to the public, or that he regarded it as well known to the art. The patent is evidence of the state of the art at the time the drawings and specifications upon which it was afterwards granted, were made, and it is the state of the art and not the patent which constitutes anticipation. *In re Millett*, 186.
17. Where an applicant for a patent claims a steam-gauge having a tapering end so that it may be secured in place without soldering, and a reference to a patent shows a similar gauge, but contains no statement that solder is not used, the patent is an anticipation, there being no reason for assuming that the patentee intended to use solder in the absence of a necessity so to do. *Id.*
18. Where S., a patent attorney and skilled mechanic, conceived an invention of an improved retaining device for rubber tires in April, 1897, and could have applied it to practical use at any time by means then well known in the art, with which he was thoroughly acquainted, although such means were crude and imperfect, but instead of doing so he devoted his time for more than two years to devising a simple and economical machine for applying the retaining device, so that he did not reduce to practice until November, 1899, and in the meantime K. conceived in October, 1898, and reduced to practice in April, 1899, it was *held*, that S. did not exercise due diligence in regard to the retaining device and K. was entitled to award of priority. *Stapleton v. Kinney*, 394.
19. In an interference proceeding, between an uncle, the senior party, and his nephew, the junior party, wherein the subject-matter in controversy was an improvement in the construction of thimbles for shoelasts, the testimony was reviewed and a decision of the Commissioner of Patents, awarding priority to the senior party as the first to conceive and reduce to practice, was *affirmed*. *Scott v. Scott*, 420.
20. The transfer of a patent will not operate to destroy the rights of a prior licensee. *Whitson v. Phonograph Co.*, 565.
- PERMITS. See BUILDING REGULATIONS.
- PETIT LARCENY. See CRIMINAL LAW, 6.
- PHONOGRAPHS AND GRAPHOPHONES. See CONTRACTS, 6; INJUNCTIONS, 5.
- PLEADING AND PRACTICE. See AFFIDAVITS OF DEFENSE; APPELLATE PRACTICE; CERTIORARI; EQUITY PLEADING AND PRACTICE; EXECUTORS AND ADMINISTRATORS, 2; JOINT OBLIGATIONS; JUDICIAL NOTICE; JUSTICES OF THE PEACE, 1-3; PROBATE PRACTICE.
1. The plaintiff in an action of assumpsit, after a plea of set-off by the defendant, cannot take a voluntary nonsuit so as to prevent the defendant from further prosecuting his plea; *construing* secs. 810, 811 and 812, R. S. D. C., permitting mutual debts to be set off between

PLEADING AND PRACTICE — *Continued.*

- the parties to an action and providing that "upon the trial of an issue of set-off, judgment shall be for the balance found due, whether to the plaintiff or defendant, with costs;" Chief Justice ALVEY *dissenting*. *Samaha v. Samaha*, 76.
2. The plaintiff, however, under such circumstances, may take a non-suit as to his own demand, without prejudice to his right to renew his action thereon, and the judgment, if for the defendant, should be so entered as to protect the plaintiff in that right. *Id.*
 3. The plaintiff in an action against a municipal corporation has the right to inspect such public records and documents as are in the possession of the defendant and which are pertinent and material to the trial of the issue; but a peremptory order on the defendant in such a case passed by the trial court on motion of the plaintiff, after notice to the defendant, requiring the defendant in its corporate capacity to exhibit certain records and documents to the inspection of the plaintiff at certain times and at certain places is improperly granted. *District of Columbia v. Bakersmith*, 574.
 4. The proper practice, under such circumstances, is for the plaintiff, upon his being refused the right to inspect, to apply by a motion, designating the particular record and document he desires to inspect, for a rule upon the official or agent of the defendant having custody of the same, to show cause why such inspection should not be allowed. If, upon the return, the rule be made absolute and be disobeyed, the right may be enforced by attachment. *Id.*
 5. The act of Congress of May 13, 1892 (27 Stat. 38), providing that all public records which have any reference or in any way relate to real or personal property in the District of Columbia shall be open to the public for inspection free of charge, incorporated as it is in a tax law, would *seem* to be in the interest and for the protection of taxpayers, and not, of itself, to give the right to a plaintiff in an action against the District of Columbia to inspect public records and documents in the possession of the defendant. *Id.*

POLICE COURT. See CRIMINAL LAW, 5, 6, 7.

PRAYERS FOR INSTRUCTION. See CRIMINAL LAW, 1-4, 12-14.

PREJUDICIAL ERROR. See CRIMINAL LAW, 14, 18, 20.

PRESUMPTION OF SURVIVORSHIP. See EVIDENCE, 1; WILLS, 1, 2.

PRESUMPTIONS. See CRIMINAL LAW, 8, 9, 20; EVIDENCE, 1; JUDICIAL NOTICE; MARRIED WOMEN, 1; WILLS, 1, 2.

PRINCIPAL AND SURETY. See BONDS; EXECUTORS AND ADMINISTRATORS, 2; JOINT OBLIGATIONS.

PRIORITIES. See EQUITY, 3; EQUITABLE LIEN, 4.

1. A provision in a contract between a contractor and the District of Columbia, providing for the payment by the contractor of all claims for work and material and for the retention by the District

PRIORITIES — *Continued.*

commissioners, in their discretion, of a sufficient sum of money from the contract price to pay such claims, does not constitute the municipal corporation a trustee for materialmen and workmen, or give the latter any enforceable lien or preference over other creditors in the distribution of any portion of the contract price remaining in the hands of the commissioners. *Richards Brick Co. v. Rothwell*, 516.

2. Where insolvent government contractors give a power of attorney to one of their creditors to perform their contracts and receive and disburse moneys received thereunder to their creditors, and such power of attorney contains no provision for the compensation of such attorney, and the affairs of the contractors are subsequently placed in the hands of receivers, of whom such attorney is one, he has no lien or preference for compensation for his services performed while acting as such attorney, in the subsequent distribution among creditors, but if entitled to compensation at all, is entitled to it only as a general creditor of the contractor. *Id.*

PROBATE COURT. See EXECUTORS AND ADMINISTRATORS; PROBATE PRACTICE.

PROBATE PRACTICE.

While, in a common-law cause, the court cannot reform a judgment and allow costs after the expiration of the term, in the probate court, the fact that the term has expired at which a judgment was rendered upon a verdict after the trial of issues concerning the validity of a will, refusing to admit the will to probate, will not preclude the court from allowing the executor who has unsuccessfully defended the will counsel fees and costs incurred by him, such expenses not being costs necessarily taxable against the unsuccessful party, but being elements of the accounting within the control of the court during the whole period of administration. *Tuohy v. Hanlon*, 225.

PRODUCTION OF PUBLIC RECORDS. See PLEADING AND PRACTICE, 3-5.

PROMISSORY NOTES. See AFFIDAVIT OF DEFENSE, 1, 3; INJUNCTIONS, 3; MARRIED WOMEN, 1, 2; NATIONAL BANKS; USURY, 1, 2.

1. Circumstances of suspicion only are insufficient to charge the holder of a promissory note for value with knowledge of its invalidity as between the maker and payee. *Brewer v. Slater*, 48.
2. While reference on the face of a promissory note to the fact that it is secured by mortgage, may be sufficient to call attention to any restraining or qualifying words of the mortgage having special relation to the note, and affecting its negotiability, and require that the two be read and interpreted together, the negotiability

PROMISSORY NOTES — *Continued.*

of the note, in the absence of such words, is not affected; and the debt evidenced by the note gives character to the mortgage and protects it from the equities between mortgagor and mortgagee on behalf of a *bona fide* holder of the note for value. *Id.*

3. The trustee in a deed of trust may become the purchaser and *bona fide* holder for value of the promissory note secured by the deed of trust, his duty as trustee concerning only the security and not the debt; and the rule that forbids his purchasing the trust property has no application to his acquisition of the note in a transaction with its owner, otherwise free from taint. *Id.*

PROVISO. See STATUTORY CONSTRUCTION.

PUBLIC POLICY. See CONTRACTS, 6.

PUBLIC RECORDS, RIGHT TO INSPECT. See PLEADING AND PRACTICE, 3-5.

QUALIFIED OWNERSHIP OF CHATTELS. See CONTRACTS, 6.

QUESTIONS FOR JURY. See CONTRACTS, 3.

RAILROADS. See MEASURE OF DAMAGES; SURFACE WATERS, 1, 2.

In an action against the Pennsylvania Railroad Company for breach of a special contract for carriage, where it appeared that the plaintiff purchased, at Washington, D. C., from the Baltimore & Potomac Railroad Company, a round trip special excursion ticket to Atlantic City, N. J., entitling him to carriage on that railroad to and from Camden, N. J., and on the Camden & Atlantic Railroad from Camden to Atlantic City and return, which ticket was refused on the Camden & Atlantic Railroad on plaintiff's return from Atlantic City, it was *held*, upon the plaintiff's evidence, consisting of newspaper advertisements published in Washington prior to the purchase by plaintiff of his ticket, that special excursions would be run to Atlantic City by the Pennsylvania Railroad Company; proof that the general passenger agent of the defendant was also the general passenger agent of the two other roads; schedules of through trains between Washington and Atlantic City, published in a traveler's guide, in which the Baltimore & Potomac and Camden & Atlantic Railroads were embraced under the heading "Pennsylvania Railroad system;" extracts from an annual report of the directors of the Pennsylvania Railroad Company showing that the two roads mentioned belonged to the Pennsylvania Railroad system, and proof that the officials who arrested plaintiff at Camden for failure to pay his fare wore buttons on their uniforms containing the letters "P. RR." — was insufficient to so connect the defendant with the other railroads as to render it liable to the plaintiff. *Tyler v. Railroad Co.*, 31.

REASONABLE DOUBT. See LEGISLATIVE REGULATION OF CALLINGS.

REDEMISE. See EJECTMENT, 2.

REPAIRS. See BUILDING REGULATIONS.

REPEAL. See STATUTORY CONSTRUCTION, 1.

RES JUDICATA. See APPELLATE PRACTICE, 1; EQUITY, 2.

RESTRAINING ORDERS. See INJUNCTIONS, 1, 3, 4, 5, 6; MUNICIPAL ORDERS AND REGULATIONS, 1.

RESTRAINT OF TRADE. See CONTRACTS, 1-3.

RIGHT OF WAY. See MEASURE OF DAMAGES, 1.

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RULE TO INSPECT PUBLIC RECORDS. See PLEADING AND PRACTICE, 3-5.

SALES. See CONTRACTS, 1-3; MEASURE OF DAMAGES, 3.

SELF-DEFENSE. See CRIMINAL LAW, 1-4.

SET-OFF. See EQUITY, 2; PLEADING AND PRACTICE, 12.

SEVENTY-THIRD RULE. See AFFIDAVITS OF DEFENSE.

SPECIFIC PERFORMANCE.

Where trustees to whom has been devised land for the sole and separate use of a married woman for life have agreed in a lease thereof to a railroad company to sell the land to the company, for a specified sum, and it is doubtful whether they had authority to enter into the contract for sale, and the company has the power to acquire the land by condemnation, specific performance of the contract of sale will not be decreed. *Railroad Co. v. Winslow*, 438.

STAKEHOLDER. See INTERPLEADER.

STATUTES. See MUNICIPAL ORDERS AND REGULATIONS.

STATUTORY CONSTRUCTION.

1. Where the later of two statutes, which are not in express terms repugnant, covers the whole subject of the first, and embraces new provisions plainly showing that it was intended as a substitute, it will operate to repeal the earlier statute, the presumption being that it was not the intention of the legislature that two or more acts relating to and covering the same subject-matter should remain in force together; but all such acts being in *pari materia* must be construed together in order to arrive at the legislative intent. *Bride v. Macfarland*, 120.
2. The office of the proviso of a statute is, generally, intended to restrain the enacting clause, and to except something which would otherwise have been within it, or in some measure to modify enacting clause. *Id.*

STREET RAILWAYS. See CONTRIBUTORY NEGLIGENCE, 1.

SUBDIVISIONS. See BUILDING REGULATIONS, 2.

SUBROGATION. See EQUITY, 3.

SUPREME COURT OF THE DISTRICT OF COLUMBIA. See JUDICIAL NOTICE.

SURETYSHIP. See BONDS.

SURFACE WATERS.

1. A railroad company has no right to concentrate or accumulate surface water in ditches along the tracks or bed of its road and by cut-ways or outlets turn it upon the lower adjoining or adjacent lands to the injury of proprietors thereof. *Frisbie v. Cowen*, 381.
2. In the absence of a prescriptive right of drainage, a railroad company has no right to utilize a depression or gully, not constituting a natural watercourse, in the lower land of an adjoining owner, for the purpose of receiving water from a ditch along its tracks; and such adjoining owner has the right to fill up and level his land; and if, in so doing, it becomes flooded and injured from the flow of water from the ditch, is entitled to recover damages from the railroad company. *Id.*

SURVIVORSHIP, PRESUMPTION OF. See EVIDENCE, 1; WILLS, 1, 2.

TAX DEEDS. See TAX SALE CERTIFICATES.

TAX SALE CERTIFICATES.

A writ of *mandamus* will not lie to compel the Commissioners of this District to execute and deliver to the petitioner, the assignee of a tax sale certificate, a deed conveying to him a certain lot, without the payment of arrears of taxes due thereon, where the lot was sold and the certificate issued to petitioner's assignor in April, 1898, and the certificate recited that the sale was made in accordance with the provisions of the act of Congress of February 28, 1898, and that it was issued "subject to the payment of all arrears of taxes before the issue of the deed," as required by that act, although the levy or assessment of the taxes for which the sale was made was under the act of Congress of March 3, 1877, and the amendments thereto, which contained no such provision as to payment by the purchaser of arrears of taxes as a condition precedent to the execution and delivery to him of a deed. *Bride v. Macfarland*, 120.

TELEPHONE SERVICE. See EQUITY, 1.

1. A telephone company incorporated under the laws of another jurisdiction and doing business in this District by sufferance only, may be compelled to perform its accustomed service at a rate fixed by Congress as a condition to its remaining and doing business here, although the rate so fixed may be wholly insufficient to meet the necessary expenses of the service to be performed. *Manning v. Telephone Co.*, 191.
2. In considering the evidence and determining whether compensation for telephone service as prescribed by law is destructive of the property rights of an existing telephone company, the basis of

TELEPHONE SERVICE — *Continued.*

estimation is properly the reasonable, actual value of the property used in the business, cost of maintenance and the expense of carrying on the business. *Id.*

3. The testimony reviewed in a case in which a foreign telephone company doing business in the District of Columbia claimed that the provision of the appropriation act of Congress of June 30, 1898, making it unlawful for any telephone company doing business here to charge a greater rate for telephone service than that fixed by the act, was invalid as confiscating its property by fixing a rate for such service less than cost, and the opinion expressed that the evidence did not show that the necessary effect of the enforcement of the rate would be destructive of the company's rights of property. *Id.*

TEMPORARY RESTRAINING ORDERS. See INJUNCTIONS, 1, 3, 4, 5, 6; MUNICIPAL ORDERS AND REGULATIONS, 1.

THEFT. See CRIMINAL LAW, 16, 17, 18, 19, 20.

THREATS. See CRIMINAL LAW, 1.

TICKETS. See RAILROADS, 1.

TRANSCRIPT OF RECORD ON APPEAL. See APPELLATE PRACTICE, 7-11; CRIMINAL LAW, 8, 9.

TRUST FUNDS, FOLLOWING OF. See EQUITY, 3.

TRUSTS AND TRUSTEES. See ESTOPPEL; PRIORITIES, 1; PROMISSORY NOTES, 3.

Quære, whether trustees to whom land has been devised in trust for the sole and separate use of a married woman for life with the right in her to have the use and occupation thereof, to receive and receipt for the income therefrom without the intervention of the trustees and to direct a sale thereof and investment of the proceeds, have the right, with the assent of the life tenant, to provide in a lease of the land to a railroad company, that the company shall have the right thereafter to purchase the property in fee-simple, with a good and valid title, for a specified sum of money. *Railroad Co. v. Winslow*, 438.

ULTRA VIRES ACTS. See NATIONAL BANKS.

USURY.

1. Promissory note or other obligation is affected with usury if the principal makes the loan knowing that his agent has exacted a bonus or commission, though for his own sole benefit, which, with the interest payable to the principal, would amount to more than the rate permitted by law. *Richards v. Bippus*, 293.
2. In a suit on a promissory note, payable six months after date with interest, where the contract is shown to have been usurious, while recovery can be had of the principal only, interest is recoverable

USURY — *Continued.*

at the rate of 6 per cent. per annum, after maturity of the note; *construing* Sec. 713, R. S. D. C., imposing the rate of 6 per cent. interest per annum upon the loan or forbearance of money; Sec. 714, *id.*, making it lawful to contract in writing for 10 per cent. or less; Sec. 715, *id.*, providing that if more than 10 per cent. shall be contracted for, the whole of the interest contracted for shall be forfeited and the principal only recoverable; and Sec. 829, *id.*, providing that 6 per cent. per annum shall be awarded on all judgments in action upon contracts until satisfied, "and the amount which is to bear interest and the time for which it is to be paid shall be ascertained by the verdict of the jury sworn in the cause." *Id.*

VALUE OF LAND. See MEASURE OF DAMAGES, 2.

VARIANCE. See CRIMINAL LAW, 9.

VENDOR AND VENDEE. See CONTRACTS, 1-3.

WIDOWS. See EJECTMENT, 2.

WILLS.

1. Where a testatrix devises her estate to her son, and provides that if she shall become the survivor of her son, the estate shall go to a certain charitable institution, and she and her son perish in the same shipwreck, the death of the son in the lifetime of his mother is a condition precedent to the taking effect of the bequest over, and the burden of proving that fact is upon the legatee, who will not take under the will unless such burden be discharged. *Faul v. Hulick*, 9.
2. As between the next of kin of the testatrix, in such a case, and the personal representatives of the son, as the will vests the estate in the son immediately upon the testatrix's death, the son's representatives have a *prima facie* right to take, and will do so in the absence of proof of the survivorship of the testatrix. *Id.*

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