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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. GERBER, JR., and ANGLO-CALIFORNIA TRUST COMPANY (a corporation),

Appellants,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Appellees.

No. 3749

BRIEF FOR APPELLANTS.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellants.

OSCAR SUTRO,
FELIX T. SMITH,
Of Counsel.

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BRIEF FOR APPELLANTS.

A. Statement of the Case.

1. THE FACTS.

There is no material dispute as to the facts, the following statement being made up of quotations from the opinions of the court below, corrected and supplemental in minor matters.

On October 21, 1920, Pacific Motorship Company owned the motorship "Benowa", the respondent herein, together with three other similar boats, the "Babinda", the "Balcatta" and the "Boobyalla", subject to mortgages of $344,000 on each vessel in favor of the Australian Government (apostles, p. 309).

On that day Pacific Motorship Company made a contract with the Australian Government (apostles, pp. 329-347) under which a new corporation was to acquire these boats and four others, the "Cethana", "Challamba", "Coolcha" and "Culburra", and certain other property, the existing mortgages were to be released and $1,625,000 in bonds secured by a new mortgage were to be issued to the Australian Government. As provided in this contract, the "Benowa" was immediately conveyed to Anglo-California Trust Company, the substituted claimant, and one of the appellants, as trustee (apostles, pp. 510-517).

> "The libelants on January 21, 1921, signed articles with the master of the Steamship "Benowa" at the Port of Baltimore to ship on a voyage from the Port of Baltimore via one or more coastwise ports to one or more ports on west coast of the United States, and final port of discharge on west coast of the United States, for a period not exceeding three calendar months, 'and if crew is discharged on the west coast, transportation will be paid back to Port of Baltimore, Maryland'." (apostles, p. 222.)

January 24, 1921, Houlder, Weir & Boyd, Inc., the New York agents of Pacific Motorship Company, made a contract with the Navy Department for the vessel to

carry coal from Hampton Roads, Va., to Bremerton, Wash. (apostles, p. 465).

In February, Pacific Motorship Company became hopelessly insolvent (apostles, p. 200).

> "The vessel arrived in San Francisco February 28th" (apostles, p. 222).

She put in here in distress, and negotiations were opened with the Navy Department for permission to deliver the cargo at San Francisco (apostles, pp. 492-493).

While these negotiations were pending, on March 8, 1921, the Australian Government commenced a suit in the District Court for the foreclosure of the equitable lien created by the contract of October 21, 1920, asking for a receiver of the various vessels, etc. (apostles, pp. 303-347).

March 9, 1921, permission was granted by the Navy Department to discharge the cargo here (apostles, pp. 497-499).

March 10, 1921, a libel was filed in the District Court by McIntosh and Seymour Corporation against the "Benowa", under which the marshal seized the vessel; intervening libels were filed by various proctors representing other lien holders (apostles, pp. 269-284). Other independent libels were also filed against this vessel and others of the vessels named, and *in personam* against Pacific Motorship Company (apostles, pp. 255-299).

Meanwhile the application for the appointment of a receiver was argued and continued from time to time (apostles, p. 300).

"The libel was filed on March 15th" (apostles, p. 223).

The libel demanded *wages* "to the date hereof", *money* "to procure a passage back to Baltimore", *support* "until they can secure such passage" and *subsistence* "on their way home" (apostles, p. 15), and also the *penalty* provided by R. S. 4529 "for each of the days said wages remain unpaid from and after the 15th day of March, 1921" (apostles, p. 15). The schedule annexed to the libel shows the amounts claimed by libelants to be due as wages up to March 15th, that claimed by Spencer being $623.85, and the total being $10,395.83 (apostles, p. 18). On the following day, libelants' proctor, on their behalf, sent a telegram to the Navy Department, demanding that it withhold $10,395.83 out of the freight for libelants (apostles, p. 479). At the same time he sent a similar letter to the naval commander here (apostles, pp. 477-478).

The vessel "was discharged March 17th" (apostles, p. 222).

On the same day Pacific Motorship Company assigned to libelants' proctor, as trustee, $12,000 to meet the claims of libelants (apostles, pp. 204-205) and telegraphed to Washington directions to pay this sum to libelants' proctor (apostles, pp. 476-477), who at the same time telegraphed his acceptance of the assign-

ment, and a release of the demand wired the Navy Department the day before (apostles, p. 476).

> "The receiver was appointed on the 26th day of March for eleven motorships, including the "Benowa", and for the interests of the defendants in thirteen other ships. The receiver qualified on the 28th." (apostles, pp. 222-223.)

This is manifestly a typographical error. There were only seven motorships, and eight other ships (apostles, p. 348).

Presumably at about the same time the freight money was paid by the Navy Department to Houlder, Weir & Boyd, Inc. (apostles, p. 449), in whose hands it was attached in a suit of Pacific Steam Navigation Company v. Pacific Motorship Company (apostles, pp. 103; 508).

Shortly before April 27, 1921, W. E. Gerber, Jr., the substituted intervening libelant and the other appellant, entered into negotiations for the purchase of the claim of the Australian Government, the first assurance that it would be possible being received on April 27 (apostles, pp. 208-209).

> "On the 27th of April, 1921, the parties hereto and Messrs. Thacher & Wright, appearing for McIntosh-Seymons Corporation, Henry C. Peterson, Inc., and E. C. Generlux appeared before the court, and such proceedings were had that an order was entered referred this cause to Francis Krull, United States Commissioner, to take the testimony and report findings and conclusions" (apostles, p. 225).

> "On the 27th day of April the following tender in writing was filed in this proceeding:

'Now comes William E. Gerber, Jr., and hereby offers to pay to libelants herein the sum of fifty-six hundred and nine and 20/100 dollars ($5609.20), being wages due to libelants in accordance with the shipping articles mentioned in the libel herein, up to and including the 17th day of March, 1921, which said sum is herewith deposited with the clerk of this court.

'Said William E. Gerber, Jr., likewise offers to pay to libelants their costs heretofore incurred herein.

'Said William E. Gerber, Jr., likewise offers to furnish to such of libelants as may desire the same, transportation in accordance with said shipping articles.' '' (Apostles, p. 225.)

At the same time Gerber deposited $5,609.20 in the registry (apostles, p. 7).

Up to this time there had been no funds available to Pacific Motorship Company or to the receiver for the payment of the libelants, the only possible source being the freight money, which, as above explained, was never realized (apostles, pp. 94, 103, 200). On May 30, Gerber closed his negotiations with the Australian Government (apostles, p. 208).

''Testimony was thereafter taken and returned into this court.'' (Apostles, p. 225.)

''On or about May 5, 1921, the ''Benowa'' was released from the receivership. On May 10th Gerber was substituted as intervenor in place and stead of the Commonwealth of Australia.'' (Apostles, p. 225.)

''On the 14th of May, 1921, a decision was filed'' (apostles, p. 226).

Notwithstanding the rules of this court, and the *praecipe* herein (apostles, p. 3), the clerk has omitted this decision. For the information of the court we print it as an appendix hereto.

The effect of this decision is expressed in the following summary:

> "An Admiralty Court applies the principles of equity in so far as it may be done, and in this case I think the seamen are entitled to the full amount of their unpaid wage to and including the 17th of March, and to the further sum equal to one day's pay for each and every day from said date until the entry of this decree, and for the amount of the provisions actually necessary and secured for their maintenance upon the vessel, and also for transportation together with subsistence en route for all such as desire to return to the home port." (Appendix, p. vi.)

> "On the 16th day of May, upon the suggestion of Thacher & Wright, the matter was reassigned for argument on the 17th of May, at which time appeared Ira S. Lillick, Esq., and Arthur Olson, Esq., appearing for Libelants, and Felix Smith, Esq., representing Messrs. Pillsbury, Madison & Sutro, for Respondent and Substituted Intervening Libelant, W. E. Gerber, Jr., and Messrs. Thacher & Wright appearing for McIntosh- Seymons Corporation, Henry C. Peterson, Inc., and E. C. Genereux" (apostles, p. 226).

The supplemental decision filed May 17, 1921, eliminates the part of the original decision awarding libelants "the amount of the provisions actually necessary and secured for their maintenance upon the vessel".

On the day this opinion was filed, it was agreed between counsel and Judge Neterer "that no penalty

should be imposed for any delay subsequent to'' that day (apostles, p. 239).

The interlocutory decree entered May 25, 1921 (apostles, pp. 231-233), fixed specific amounts due libelants as wages up to March 17, 1921, the amount so awarded Spencer being $404.85, and the total of these amounts being $5,551.07.

Before the final decree was entered, two of libelants, Crawford and Hughes, accepted the amounts deposited to their credit in the registry by Gerber, and transportation from San Francisco to their homes, so that in their case the final decree, entered June 2, 1921 (apostles, pp. 251-254), is merely for the penalty. As to the other libelants, it covers wages, penalty and an anomalous provision for transportation. The total amount of wages and penalty in the final decree is $20,919.67, of which $16,198.88 is penalty. Spencer is awarded $1310.00, of which $404.85 is for wages and $905.24 is for penalty.

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2. THE QUESTIONS INVOLVED.

The questions involved relate:

First—To the penalty;

Second—To the provision for transportation;

Third—To the condition in which it was at the time of the entry of the decree in this cause.

First—As to the penalty, it is our position that:

I. Under no circumstances can any penalty be imposed for any period subsequent to April 27, 1921, the

date of the tender to libelants, under which more was actually deposited in the registry than was subsequently awarded to libelants as wages.

II. No penalty should be imposed for any period subsequent to March 26, 1921, the date of the appointment of the receiver.

III. No penalty at all should be imposed in this case for the reason that

(*a*) There was sufficient cause for the delay in the payment of wages, in that

(1) The financial condition of Pacific Motorship Company made the payment impossible.

(2) The dispute as to the amount of wages due justified refusal to pay until this could be adjusted.

(3) The acceptance by libelants of the assignment of the freight money made it unnecessary for Pacific Motorship Company to attempt to pay libelants from some other source.

(*b*) There is no allegation that the delay in payment was without sufficient cause.

(*c*) The effect of the decree is to penalize not the owners of the vessel, but those having liens upon her.

IV. The amount of the penalty is computed wrongly.

Second—As to the provision for transportation, we insist that libelants should have accepted the transpor-

tation offered by Gerber, and not recovered money in lieu thereof.

Third—As to the condition of this case at the time of the entry of the decree, we point out that it was improper to enter a decree for the sale of the vessel under a junior libel without consolidating it with earlier libels and intervening libels under which the vessel is held by the marshal, and without notice to these libelants and intervening libelants.

B. Specification of the Errors Relied Upon.

I.

That the District Court erred in rendering and entering the interlocutory decree herein, dated May 25, 1921 (*supra,* pp. 8-10).

II.

That the District Court erred in rendering and entering the final decree herein, dated June 2, 1921 *(supra,* pp. 8-10).

III.

That the District Court erred in not dismissing the libel herein with costs to claimant, as prayed for in claimant's answer, and in not granting to claimant a decree of dismissal herein with its costs as so prayed for (*supra,* pp. 8-10).

IV.

That the District Court erred in rendering and entering any decree herein, because the motorship "Benowa"

was never seized under process issued herein *(infra,* pp. 49-54).

V.

That the District Court erred in rendering and entering any decree herein, because at the time of the filing of the libel herein the motorship "Benowa" was, ever since has been and now is under seizure and in the possession of the Marshal of the District Court under process issued in the cause now pending in the District Court entitled "McIntosh & Seymour Corporation, a corporation, Libelant, v. American Motorship 'Benowa', her engines, tackle, apparel and furniture. etc., Respondent, No. 17116" (*infra,* pp. 49-56).

VI.

That the District Court erred in rendering and entering any decree herein, because at the time of the filing of the libel herein there were pending against the said motorship "Benowa" other libels, which said libels ever since have been and now are pending in said District Court (*infra,* pp. 49-56).

VII.

That the District Court erred in rendering and entering any decree herein, without consolidating this cause with numerous other libels against the motorship "Benowa" pending in said District Court at the time of the entry of said decree and now pending therein (*infra,* pp. 49-56).

VIII.

That the District Court erred in rendering and entering any decree herein, because the above entitled cause

was not at issue at the time of the entry of said decree and is not yet at issue (*infra,* pp. 49-56).

IX.

That the District Court erred in rendering and entering any decree herein, because said libels against said motorship "Benowa", filed prior to the filing of this libel, were not at issue at the time of the entry of said decree, and are not yet at issue (*infra,* pp. 49-56).

X.

That the District Court erred in rendering and entering any decree herein without having notified the parties to said prior libels of the hearing of this cause, or of the intention to render or enter any decree herein (*infra,* pp. 49-56).

XIII.

That the District Court erred in holding, deciding and decreeing that libelants were entitled to recover any sum whatever out of the motorship "Benowa", her engines, boilers, machinery, tackle, apparel and furniture (*supra,* pp. 8-10).

XIV.

That the District Court erred in holding, deciding and decreeing that libelants recover any sum for wages or penalty subsequent to March 17, 1921 (*infra,* pp. 17-47).

XV.

That the District Court erred in holding, deciding and decreeing that libelants recover any sum for wages or penalty subsequent to March 26, 1921 (*infra,* pp. 20-30).

XVI.

That the District Court erred in holding, deciding and decreeing that libelants recover any sum for wages or penalty subsequent to April 27, 1921 (*infra,* pp. 17-20).

XVIII.

That the District Court erred in holding and deciding that on the arrival of the vessel that the receiver did nothing for the physical care of the ship or for supplying any provisions (*infra,* pp. 23-25).

XXI.

That the District Court erred in holding and deciding that subsequent to March 17, 1921, the master and crew discharged the routine duties of the vessel which was lying at anchor (*infra,* p. 24).

XXII.

That the District Court erred in holding and deciding that no provisions were furnished (*infra,* p. 24).

XXV.

That the District Court erred in holding and deciding that the receiver, in his testimony as to what he did, made the statement set forth in said decision (*infra,* pp. 24-25).

XXVI.

That the District Court erred in holding and deciding that the contention that the libelants were not entitled to the statutory penalty after March 17, 1921, is not well founded (*infra,* pp. 17-47).

XXVIII.

That the District Court erred in holding and deciding that the contention that the penalty is a personam liability and may not be impressed as a preferred lien with the wages, is out of harmony with the plain sense of the statute (*infra,* pp. 44-46).

XXIX.

That the District Court erred in holding and deciding that the penalty is in effect an increase of wages (*infra,* pp. 31-32).

XXX.

That the District Court erred in holding and deciding that there is an agreement in this case as to the amount due for wages (*infra,* pp. 37-39).

XXXI.

That the District Court erred in holding and deciding that the only contention is that the inability of the claimant to pay because of lack of funds is sufficient cause to avoid the penalty (*infra,* pp. 17-20, 37-47).

XXXII.

That the District Court erred in holding and deciding that the intent of the statute is not to hold the wage earner responsible for the financial inability of the ship to meet its wage obligations (*infra,* p. 34).

XXXV.

That the District Court erred in holding and deciding that the seamen are entitled to the further sum

equal to one day's pay from the 17th day of March, 1921, for each and every day until the entry of the decree herein (*infra,* pp. 17-47).

XXXVI.

That the District Court erred in holding and deciding that the seamen are entitled for the amount of the provisions actually necessary and secured for their maintenance upon the vessel (*infra,* p. 24).

XXXVII.

That the District Court erred in holding and deciding that the purpose of the statute is that a seaman should be protected against enforced idleness and nonsubsistence by being required to wait for payment of his wages when he is without fault and no sufficient cause exists other than the financial inability of the ship (*infra,* pp. 33-37).

XXXVIII.

That the District Court erred in holding and deciding that the fact that a receiver was appointed for the claimant cannot shift the burden for nonpayment from the ship to the wage earner (*infra,* pp. 20-30).

XXXIX.

That the District Court erred in not holding and deciding that there was sufficient cause for the delay in the payment of the wages of libelants (*infra,* pp. 17-47).

XL.

That the District Court erred in not holding and deciding that the excessive claims made by libelants was

sufficient cause for delay in payment of their wages (*infra,* pp. 37-39).

XLII.

That the District Court erred in not holding and deciding that the assignment of the freight to libelants' proctor, made by claimant, was sufficient cause for delay in the payment of libelants' wages (*infra,* pp. 39-42).

XLIII.

That the District Court erred in not holding and deciding that the financial condition of Pacific Motorship Company was sufficient cause for the delay in the payment of libelants' wages (*infra,* pp. 30-37).

XLIV.

That the District Court erred in not holding and deciding that the pendency of the receivership proceedings and the appointment of a receiver therein was sufficient cause for the delay in the payment of libelants' wages (*infra,* pp. 20-30).

XLV.

That the District Court erred in not holding and deciding that the tender made by the substituted intervening libelant, April 27, 1921, and the payment into court on the following day was equivalent to the payment of libelants' wages (*infra,* pp. 17-20).

XLVI.

That the District Court erred in not requiring libelants to look entirely to the sum heretofore deposited in court for their wages (*infra,* pp. 17-20).

XLVII.

That the District Court erred in not requiring libelants to accept their transportation and subsistence en route immediately, or within a reasonable time after the entry of its decree (*infra,* pp. 47-49).

XLVIII.

That the District Court erred in ordering, deciding and decreeing that in lieu of transportation any of libelants should receive cash amounts set forth in said final decree (*infra,* pp. 47-49).

XLIX.

That the District Court erred in ordering, deciding and decreeing that if any of said libelants should have furnished their own transportation and subsistence they should be paid the cash sums mentioned (*infra,* pp. 47-49).

L.

That the District Court erred in ordering that the motorship "Benowa", her engines, tackle, machinery and appurtenances be sold (*infra,* pp. 17-56).

C. Argument.

FIRST. THE PENALTY.

I. Under no circumstances can any penalty be imposed for any period subsequent to April 27, 1921, the date of the tender to libelants under which more was deposited in the registry than was subsequently awarded to libelants as wages.

As soon as it became apparent that he might have any interest in this case, Gerber tendered libelants

the amount of their wages, as well as he could ascertain this amount, and upon their refusal to accept it, paid it into the registry (apostles, pp. 7; 44-45). The amount so tendered and deposited was $5,609.20, considerably more than $5,551.07, the total of the wages due as ascertained by the District Court (apostles, pp. 232-233).

From April 27 on, then, the delay in payment of the wages was due, not to the refusal of Pacific Motorship Company to pay, but to the refusal of libelants themselves to accept the wages tendered.

It is true that Gerber did not then offer to pay the penalty theretofore accrued and other amounts that libelants then claimed but which the District Court has refused to allow them. But the penalty is imposed by the statute for the refusal to pay *wages,*—not for refusal to meet all the demands which seamen may see fit to make. So long as there is no refusal to pay *wages,* there can be no penalty. Seamen cannot deprive the ship of the right to question such further demands as they may make, by refusing to accept their wages when tendered, and thus imposing a liability for the statutory penalty.

If it were important that there be "sufficient cause" for the refusal to meet these further demands it would be enough to point out that all of the further demands except the penalty from March 17th onward, were disallowed by the District Court, and that the decision of the District Court awarding the penalty was contrary to all cases previously reported (*infra,* pp. 33-34).

Even where there had been a decision of the District Court sustaining the penalty, the Supreme Court of the United States held that there was sufficient cause for further delay not merely in paying the accrued penalty, but also in paying the wages concededly due.

> "It is a very different thing, however, to say that the delay occasioned by the appeal was not for sufficient cause. Even on the assumption that the petitioner was wrong it had strong and reasonable ground for believing that the statute ought not to be held to apply. So that the question before us is whether we are to construe the act of Congress as imposing this penalty during a reasonable attempt to secure a revision of doubtful questions of law and fact, although its language is 'neglect * * * without sufficient cause'. The question answers itself. We are not to assume that Congress would attempt to cut off the reasonable assertion of supposed rights by devices that have had to be met by stringent measures when practiced by the States. *Ex parte Young,* 209 U. S. 123."
>
> *Pacific Mail S. S. Company v. Schmidt,* 241 U. S. 245, 250.

Counsel for libelants, indeed, has expressed the same view. We have already mentioned (*supra,* pp. 7-8) the agreement made on May 17th, that the penalty should cease as of that date. Referring to this agreement, libelants' proctor says:

> "He explains to me that such a suggestion was made by the court with reference only to the possibility of your being willing to consent to the immediate payment to the crew of the amount of the so-called tender made by you some time ago, for, if you were willing to do this, it seemed to the Judge that we should, in our turn, be willing to agree that any such decree as might be entered herein, should be entered *as of* May 17th." (Apostles, p. 240.)

If it was proper that the penalty cease on May 17th, because we were then willing to consent that the money tendered April 27th be paid to the crew immediately, was it not equally proper that the penalty cease to run on April 27th, when the tender was made and refused, —as to which incident counsel says in the same letter:

> "I appreciate the fact that you would like to see the crew paid, and I know that you did express regret that you did not accept the $5609.20 at the time it was tendered." (Apostles, p. 240.)

It is confidently submitted that there can be no conceivable justification for the imposition of any penalty subsequent to April 27, 1921.

II. No penalty should be imposed for any period subsequent to March 26, 1921, the date of the appointment of the receiver.

The defendants in the equity suit included Pacific Motorship Company, Anglo California Trust Company, one of the appellants herein, and the holder of the legal title of the "Benowa", and W. L. Comyn & Co., the general agents of Pacific Motorship Company (apostles, p. 303). The application for a receiver in that suit was in no sense collusive but was vigorously contested for ten days (apostles, p. 300).

On March 26, 1921, the District Court made an order appointing Drew Chidester receiver of the "Benowa" and other property. The order also provided:

> "That said receiver be and he is hereby fully authorized and directed to take immediate possession of all and singular the property above described and referred to, wheresoever situated or

found, and to protect the title and possession of the same; also to take possession of and hold subject to the order of this court any and all insurance policies now in effect upon the above described property or any of it, and any and all moneys due, or to become due, under said policies or any of them from the respective insurers named therein; also to take possession of and hold subject to the order of this court any and all other properties, books of account, vouchers, papers, deeds, leases, contracts, charter parties, policies of insurance and/or contracts of insurance, and/or other properties, belonging to, or pertaining to, said properties or any thereof.

Each and all and every of the defendants herein and their and each of their agents or employees and each and every of the officers, directors, agents or employees of the corporation defendants herein and all other persons, firms or corporations whatsoever having in their possession or control any of the property hereinabove described are hereby required and commanded forthwith to turn over and deliver to said receiver, or to his duly constituted representative or representatives, each and every of said property hereinabove described, and any and all other properties, books of account, vouchers, papers, deeds, leases, contracts, charter parties, policies of insurance and/or contracts of insurance, and/or other properties in their or any of their hands or under the control of them or any of them, belonging to or pertaining to said properties, or any of them, and all and every of such defendants and their and each of their agents and employees and each and every of said officers, directors, agents or employees of the said corporation defendant herein and all such other persons, firms or corporations having in their possession or control any of said properties are enjoined from interfering in any way whatever with the possession or management of any part of the said properties over which said

receiver is hereby appointed or from interfering in any way to prevent the discharge of his duty.

Said receiver is fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment for the proper protection of the said property, and likewise to defend such actions as may be instituted against him as such receiver, and also to appear in and conduct the prosecution or defense of any suit now pending in any court involving the title or possession or right to possession of said properties or any of them." (Apostles, pp. 350-352.)

Two days later the receiver qualified (apostles, p. 301). This order effectually prevented any attempt by the defendants to deal with the "Benowa", or any other assets of Pacific Motorship Company so as to raise money for the payment of libelants' claims.

In fact the District Court recognized this, and based its decision imposing the penalty after this date upon the supposed neglect of the receiver. Thus the District Judge said:

"The receiver did nothing for the physical care of the ship or for supplying the same, or for the supplying of any provisions." (Apostles, p. 223.)

And again:

"The receiver in his testimony as to what he did with relation to the 'Benowa' states 'the only action that was taken was to address a letter to the master of the ship enclosing a notice to the crew advising them that the 'Benowa' was in my hands as receiver, and notifying them that their services were no longer required, and they were ordered to get off the ship.' The notice was dictated and sent out on April 1, 1921. No payment was made or

tendered to the officers or crew nor any arrangement made for their subsistence." (Apostles, p. 224.)

The same statements are found in the original decision (appendix, pp. ii-iv).

In fairness to the receiver it is proper to point out that these statements are contrary to the fact and to the uncontradicted evidence submitted to the District Court.

The receiver did take proper measures "for the physical care of the ship". He selected proper men to take care of her while in port (testimony Chidester, pp. 98-100), and ordered libelants to leave her, as shown in the following letter:

"San Francisco, April 1, 1921.

To the
Members of the Crew
Motorship "Benowa"

This is to advise you that the M/S "Benowa" is now in the hands of a Receiver appointed by the United States District Court, and that your services are not required, and that you are to leave the ship at once.

As a matter of friendly advice and in your interest, I suggest that you seek other employment immediately, pending such arrangements as may hereafter be made in the matter of said recievership looking to the payment of the amounts already due you.

Yours truly,
(Signed) Drew Chidester,
Receiver for
DC/1 Pacific Motorship Company."

(Apostles, pp. 452-453.)

The fact that libelants chose to disregard this order, and to use the vessel as a home (apostles, pp. 143, 161), refusing possession to the receiver's men, does not show any dereliction of duty on the part of the receiver. The men selected by the receiver were sufficient to take care of the vessel (apostles, pp. 98-100; 175; 177-178; 198, 199).

The fact that the receiver did nothing in the way of "supplying any provisions" is quite immaterial, there being no occasion for any provisions. In another case (*The Rupert City,* 213 Fed. 263, 274), the trial judge had held, in accordance with the authorities there cited, that where, as here, the crew had libeled a vessel for wages, there was no obligation on the vessel thereafter to supply provisions. It would seem therefore that his decision in this case is not based upon the alleged failure of the receiver to supply provisions. However this may be, it appears that there were provisions on the "Benowa" (apostles, pp. 63-64; 175-176).

It is true that on cross-examination, the receiver did make the statement quoted in the excerpt from the opinion that appears above. This statement, however, was explained immediately upon re-direct examination (apostles, pp. 102-105). The fact is that on April 12, 1921, he filed in the District Court a report (apostles, pp. 353-368), and on April 23, 1921, he filed two petitions (apostles, pp. 368; 369-375) showing the situation of libelants and the necessity of some action (apostles, pp. 359-360). At no time did the receiver have any funds with which to meet the claims of libelants (apostles,

p. 94), even if it had been proper to make such payment without an order of court. The petitions filed April 23rd were made with a view to obtaining authority to borrow money and pay such claims as were proper; these petitions were to have been heard April 25th, but were continued on account of the imminent dismissal of the equity suit (apostles, pp. 102-103). The claim of the Australian Government upon which the receivership was founded was for $1,625,000. Besides this, there were claims aggregating $500,000 (apostles, pp. 105; 110-111). Obviously it took some time for the receiver to determine the facts in order to present them properly to the court. Under all the circumstances, he cannot be criticised for not having petitioned the court sooner for power to meet the demands of libelants. And since he could not meet these demands without the directions of the court, it must follow that libelants have no cause to complain of their treatment at his hands.

But even if there had been gross malfeasance on the part of the receiver, that could not justify the assessment of this penalty upon the appellants.

The penalty is imposed upon

> "Every *master* or *owner* who refuses or neglects to make payment." (R. S. 4529.)

The receiver was neither master nor owner, but merely an officer of the court. Refusal or neglect on the part of the receiver cannot be imputed to the appellants.

The existence of the receivership tied the hands of the owners of the vessel, so that it cannot be said that

thereafter the owners refused or neglected to pay. The owners are in no way responsible for the acts of the receiver.

> "A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. Wyatt's Prac. Reg., 355. *He is an officer of the court*; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. *Delany v. Mansfield,* 1 Hog., 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court; *Verplanck v. Mercantile Insurance Company,* 2 Paige (N. Y.) 452."
>
> *Booth v. Clark,* 17 How. 322, 331.

> "A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the court, and of all the parties in interest in the litigation wherein he is appointed. He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in

custodia legis. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits. The court will not allow him to be sued touching the property in his charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties. In such cases the court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment for contempt."

Davis v .Gray, 16 Wall. 203, 217-218.

"When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it."

Wiswall v. Sampson, 14 How. 52, 65.

"The plaintiff in error held the assets of the bank as the agent and receiver of the Court of Adams County, and subject to its order, and was not authorized to dispose of the assets, or *to pay any debts* due from the bank, *except by the order of the court.* He had given a bond for the performance of this duty, and would be liable to an action, if he paid any claim without the authority of the court from which he received his appointment, and to which he was accountable. The property, in legal contemplation, was in the custody of the court of which he was the officer, and had been placed there by the laws of Mississippi."

Peale v. Phipps, 14 How. 368, 374.

"A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his

appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property. *Skip v. Harwood,* 3 Atk. 564; *Anon.* 2 Atk. 15; *Wiswall v. Sampson,* 14 How. 52, 65; *Ellis v. Boston, Hartford & Erie Railroad,* 107 Mass. 1, 28; *Maynard v. Bond,* 67 Missouri, 315; *Herman v. Fisher,* 11 Mo. App. 275, 281."

Chicago Union Bank v. Kansas City Bank, 136 U. S. 223, 236.

"The title to property in the hands of a receiver is not in him, but in those for whose benefit he holds it. Nor in a legal sense is the property in his possession. It is in the possession of the court, by him as its officer. *Wiswall v. Sampson,* 14 How. 52, 65; *Heidritter v. Elizabeth Oil Cloth Co.,* 112 U. S. 294, 304; *Chicago Union Bank v. Kansas City Bank,* just decided, ante, 223."

Thompson v. Phenix Ins. Co., 136 U. S. 287, 297.

"When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. *Wiswall v. Sampson,* 14 How. 52, 65; *Peale v. Phipps,* 14 How. 368, 374; *Booth v. Clark,* 17 How. 322, 331; *Union Bank v. Kansas City Bank,* 136 U. S. 223; *Thompson v. Phenix Ins. Co.,* 136 U. S. 287, 297.

It is for that court in its discretion to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in

other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation, the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him. *Barton v. Barbour,* 104 U. S. 126; *Texas & Pacific Railway v. Cox,* 145 U. S. 593, 601."

Porter v. Sabin, 149 U. S. 473, 479.

"A receiver is an indifferent person, appointed by a court as a quasi officer or representative of the court, to take charge of, and sometimes to manage, the property in controversy, under the direction and control of the court, during the continuance of or in pursuance of the litigation. The appointment of a receiver determines no right. He is a part of the machinery of the court by which equity protects and secures the rights of parties,—all parties in interest. His custody is that of the law. *Booth v. Clark,* 17 How. 322, 15 L. Ed. 164."

Baltimore Bldg. & L. Ass'n v. Alderson, 99 Fed. 489, 494. (C. C. A. 4th Circuit.)

The receiver was appointed by the second division of the District Court. He held his office for the protection and in the interest of libelants just as much as that of any other creditor, including the Australian Government and those filing the other libels and intervening libels on the "Benowa". No suggestion has been made in the suit in which he was appointed, or in any proceeding in the Second Division that he has been derelict in any way. The First Division of the same

court, however, by the decree here under review, has assumed to determine that the receiver neglected his duties and has penalized, not the receiver, but appellants and the other innocent creditors of the "Benowa".

It is submitted that the portion of the penalty covering the period subsequent to the appointment of the receiver cannot be sustained.

III. No penalty at all should be imposed:

(a) There was Sufficient Cause for the Delay in the Payment of the Wages.

(1) *The financial condition of Pacific Motorship Company made the payment impossible.*

The cargo was discharged March 17th. Under the Statute (R. S. 4529) the wages were due the following day, March 18th. The conditions on that date, therefore, govern.

The court will take judicial cognizance of the financial difficulties in which the business of this country and the whole world were involved for the period commencing with December 1920, and of the fact that the consequent depression has been felt most seriously in the shipping business. Along with many other such concerns, Pacific Motorship Company had found itself unable to meet its obligations.

Its only assets had been its interest in these eight motorships, on which the Australian Government had a claim of $1,625,000 (apostles, pp. 315-316; 110; 210).

With falling freights and values, and other claims piling up against the vessels, it had become apparent

that the Company could not succeed, and it was impossible to obtain any money to finance the vessels. For at least a month the Company had been hopelessly insolvent (apostles, pp. 111; 200). The "Benowa" had put into San Francisco in distress (apostles, p. 492) and the "Balcatta" was capsized off the coast of South America (apostles, pp. 201-202, 356-358). The commencement of the receivership proceeding had precipitated suits upon various other claims, the records of the District Court introduced below showing fourteen suits (apostles, pp. 255-299) involving an aggregate of over $150,000, of which three (apostles, pp. 270, 286, 291), involving $12,000 were against the "Benowa" itself. At the same time suit was imminent upon other claims aggregating almost $57,000 including over $3,000 on the "Benowa." All three of the boats in San Francisco were in the hands of the marshal (apostles, pp. 202, 359-363). Finally, before their pay was due, libelants libeled the "Benowa" (apostles, pp. 12-18) and did their best to prevent the payment of the freight (apostles, pp. 479; 477) which was the only source from which the Company could hope to pay their wages (apostles, pp. 94; 204-205). On March 18th, the Company was without funds, and unable to obtain funds (apostles, pp. 200; 204). It was absolutely impossible for the Company to pay the crew.

The provisions of R. S. 4529 relied upon by libelants are undoubtedly penal in their nature.

This was clearly recognized in the opinions of the district judge herein who denominates this a penalty no less than thirteen times.

In this he follows the Supreme Court of the United States whose only decision on the statute mentions it as a penalty on every page of the opinion.

Pacific Mail S. S. Co. v. Schmidt, 241 U. S. 245.

And more recently the Supreme Court of the United States in considering a somewhat similar State statute, less drastic than that here involved, held definitely that it was penal, despite a contrary decision of the State courts.

Missouri Pacific R. R. Co. v. Ault, 41 Sup. Ct. 593.

The effect of the decree of the District Court, then, was to impose a penalty for the failure of Pacific Motorship Company to do something which it was impossible for it to do. If the statute required such a shocking result it would be subject to various constitutional objections; and if there were any doubt as to the construction of the statute, it would have to be construed against the application of the penalty.

> "In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal construction. The defendant is not to be subjected to a penalty, unless the words of the statute plainly impose it."
>
> *Tiffany v. National Bank of Missouri,* 18 Wall. 409, 410.

A statute imposed a liability for the debts of a corporation upon its officers, for failure to make an annual report.

> "Defendant contends that the statute * * * is penal and should be strictly construed; in which

proposition the court unhesitatingly concurs. Statutes somewhat similar in character have been passed in several of the States, in all of which States it is held that the statutes are penal, and that for that reason their provisions must *receive a strict construction.*''

Steam Engine Co. v. Hubbard, 101 U. S. 188, 191.

''The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; *if ambiguous,* the court will lean more strongly in favor of the defendant than it would if the statute were remedial.''

Bolles v. Outing Co., 175 U. S. 262, 265.

But our case does not require the resolution of any doubts as to the meaning of ambiguous language in the statute. The statute plainly and clearly limits the penalty to cases where payment has been refused

''without sufficient cause''.

One of the district courts of this circuit has held directly that

''their inability to command the money necessary to pay off the crew is sufficient cause to relieve them from liability under this statute.''

The Gen. McPherson, 100 Fed. 860, 864.

A similar result was reached in the first circuit.

The Wenonah, Fed. Case No. 17,412.

Without noticing these decisions, the District Court held the penalty applicable where

> "No sufficient cause exists *other than the financial inability* of the ship."
>
> (Apostles, p. 228.)

That is, the district judge, in order to justify the result reached by him, has written into the limitation prescribed by Congress

> "without sufficient cause"

an exception not found in the statute itself,

> "other than financial inability."

No authority is cited in support of this interpolation.

In the first of his opinions herein, the district judge recognized that there was no misconduct on the part of the company sufficient to deserve the penalty, and attempted to do equity by reducing the penalty to what he thought would be a fair compromise (Appendix, p. vi). It would seem, therefore, that while he felt that the statute required the imposition of the penalty, he also felt that in the present case the imposition of the penalty was contrary to justice and equity.

In support of his ruling, the district judge said:

> "Clearly the intent of the statute is not to hold the wage earner responsible for the financial inability of the ship to meet its wage obligations." (Apostles, p. 227.)

True enough. But as he also says:

> "Wages are a first and prior charge against the vessel." (Apostles, p. 227.)

and this priority is in itself enough to relieve the wage-earner from any consequences of financial embarrassment of the shipowner.

In the present proceeding libelants cannot possibly recover more than the value of the ship. As long as that value is as much as their proper wage claims, they are adequately protected and need no penalty; and if the value of the ship is less than their wage claims, then nothing is accomplished by giving them a decree for the additional amount of penalty which can never be satisfied.

The penalty is not designed for the protection of seamen from the *financial inability* of the employer, but in order to prevent the employer from taking advantage of them by *arbitrary* or *oppressive* refusal to pay.

It has been said that penalty might be imposed

> "for *vexatious* delay".
>
> *The Amazon,* 144 Fed. 153, 155.

and that the statute was applicable to

> "instances where masters have been known to *wilfully* refuse to pay seamen their wages."
>
> *The Cubadist,* 252 Fed. 658, 662.

> "The statute is a penal statute, intended to punish masters of vessels who, without any just excuse, *arbitrarily* refuse to pay seamen their wages when due."
>
> *The Express,* 129 Fed. 655, 656.

There is no case where the penalty has been imposed upon an employer who, with the best intentions, and entirely innocent of any desire to oppress the crew, finds himself in such straits that he has no money with which to pay them.

As we have seen (*supra,* p. 8), the penalty awarded in this case was more than three times the amount of wages due. While a penalty of this kind is proper where there has been a wilful disregard of seamen's rights, it is manifestly improper where the employer has made every effort to pay the seamen. The law does not punish a man for his misfortunes. That a company has suffered losses, and is in need of money, is no reason for adding to its financial burdens.

In the present case the seamen libeled their ship *before* their wages were due, or even entirely earned. The only sources from which they could be paid were the ship and the freight. They had a prior lien on the ship and could cause it to be sold free of all liens at any time; the company could only dispose of it subject to claims. The freight had been assigned to the crew's proctor (*supra,* p. 4, *infra,* pp. 39-42), and he was in a position to enforce their prior right to it against the attaching general creditor; the company had no answer to the attachment. Libelants, however, avoided having the vessel sold, preferring to use it as a home (*supra,* p. 24; apostles, pp. 143, 161), and allow their claim for the penalty to run up. Nor did their proctor take any steps to collect the freight which had been assigned to him as trustee.

There was nothing Pacific Motorship Company could have done to expedite the payment of libelants. The delay was due to the company's financial condition, and, apparently, also to the choice on the part of libelants and their proctor, to allow the penalty to increase rather than to realize their wages at once. Under these cir-

cumstances, the imposition of a penalty comes as a surprise.

(2) *The dispute as to the amount of wages due justified refusal to pay until this could be adjusted.*

The amount of wages due was $5,551.07 (apostles, pp. 232-233, *supra,* p. 8). Libelants, however, had demanded in their libel wages amounting to $10,395.83 (apostles, p. 18, *supra* p. 4), and their proctor had made similar claims against the freight (apostles, pp. 479; 477, *supra,* p. 4).

The case of Spencer is typical. In the libel he demanded $623.85 as wages. He actually recovered $404.85 as wages.

The libelants persisted in these excessive claims until after the court had decided definitely that they were groundless.

This proceeding was begun in March. In April, Gerber tendered $5609.20, *more* than the wages ultimately found due. Libelants refused to accept it, not only then, but at various later dates. After the decision of the case, indeed, two of the twenty-six members of the crew accepted their wages (apostles, p. 9). A majority accepted their wages June 2nd, the date the final decree was filed (apostles, p. 9). The inference is irresistible that if $5,551.07 had been tendered on March 18th, it would have been refused just as the $5,609.20 was refused the next month.

The delay in paying the crew off, therefore, was due to a controversy as to the amount of wages owing, *in which controversy the employer was in the right.*

The cases are numerous that even where the employer is in the wrong, nevertheless if he disputes the amount due in good faith, this controversy is sufficient cause for refusal to pay until the question is determined by a court.

Pacific Mail Steamship Co. v. Schmidt, 241 U. S. 245;

Franco v. Seas Shipping Corporation, 272 Fed. 542, 543;

The Cubadist, 252 Fed. 658, 662;

The Sentinel, 152 Fed. 564, 566;

The Amazon, 144 Fed. 153, 155;

The Sadie C. Sumner, 142 Fed. 611, 613;

The St. Paul, 133 Fed. 1002;

The Express, 129 Fed. 655;

The George W. Wells, 118 Fed. 761, 762-763;

The Alice B. Phillips, 106 Fed. 956.

The Supreme Court of the United States, indeed, has held that where a shipowner in good faith disputes a part of the seamen's claim, even though the shipowner be in the wrong, this dispute is sufficient cause for a refusal to pay even the amount admittedly due.

Pacific Mail S. S. Co. v. Schmidt, 241 U. S. 245.

To the same effect is the *dictum* in

The George W. Wells, 118 Fed. 761, 763.

In the present case, the employer was in the right; the amount of wages ultimately found to be due was less than the employer's original estimate. The excessive demands of libelants were not only unfounded in fact, but so outrageous that the district judge himself said:

> "There is no ground for controversy with respect to the wages which were earned and which were due."
>
> (Apostles, p. 226.)

The employer's tender of more than the amount due was repeatedly refused by libelants, and was only accepted by them when it was clear that the district court would not award them any more. It is respectfully submitted that, on the authorities cited, the controversy as to the amount of wages due was sufficient cause for the delay.

(3) *The acceptance by libelants of the assignment of the freight money made it unnecessary for Pacific Motorship Company to attempt to pay libelants from some other source.*

The amount of wages due was $5,551.07 (apostles, pp. 232-233, *supra,* p. 8) which became due March 18, 1921 (*supra,* p. 30). On the preceding day Pacific Motorship Company had assigned to libelants' proctor and the latter had accepted as trustee $12,000 to meet their claims (apostles, pp. 204-206; 476; *supra,* p. 4).

If this did not constitute actual payment and satisfaction of libelants' demands, Pacific Motorship Company was, nevertheless, justified in relying upon libelants' acceptance of this assignment and election to look to the freight for payment. Having assured to libelants this means of obtaining payment, the company was under no duty to try to obtain other means by which they could be paid, and should not be penalized because libelants later chose not to realize upon the assignment.

After receiving the assignment on March 17, 1921, libelants did nothing until on April 1, 1921, their proctor was advised that the freight money had been paid to Houlder Weir & Boyd, Inc. (apostles, p. 449) in whose name the contract of affreightment had been made.

Instead of taking any steps to obtain a recognition of his assignment by Houlder, Weir & Boyd, Inc., libelants' proctor sent a telegram to Pacific Motorship Company's representative in Washington (apostles, p. 450) practically charging him with bad faith, these charges being totally unfounded (apostles, pp. 450-451; 457-460; 503-508) and a long letter of expostulation to the Secretary of the Navy (apostles, pp. 465-471) intimating that this result had been obtained "through possible influence, of which I know nothing", and stating that the letter was written merely in order that the incident "may not be repeated", followed by another in similar tone (apostles, pp. 460-463).

Beyond this libelants did absolutely nothing to collect the assigned freight moneys. No demand whatever was made upon Houlder, Weir & Boyd, Inc.

The latter, of course, never made any claim to these freight moneys as its own, but collected them merely for the account of Pacific Motorship Company (apostles, p. 360). The only reason Houlder, Weir & Boyd, Inc., did not remit these funds immediately to the receiver was the existence of the attachment suit brought in New York by Pacific Steam Navigation Company on its claims against Pacific Motorship Company (apostles, p. 360). Neither the receiver nor Pacific Motorship Com-

pany was in a position to claim the freight as against the attaching creditor. The assignment, however, was prior to the attachment, and neither Houlder, Weir & Boyd, Inc., nor the attaching creditor could have had any answer to a claim asserted by libelants under the assignment. No such claim, however, was ever asserted on behalf of libelants.

Having accepted the assignment, libelants were under a duty to their employer to make some effort to realize upon it. They failed to do so, and now ask that their employer be penalized because of this failure.

It is well settled that, even though an assignment has not operated *per se* as payment of the debt of the assignor to the assignee, nevertheless where due diligence is not used in collecting the assigned claim, whereby it is lost, the assignment is deemed payment.

Thus in *Turner v. Rabb,* 4 Mart. (O. S.) 330, a debtor had given his creditor an order for certain cotton "which if paid, is in full". The creditor delayed presenting the order until after the cotton had been destroyed. This delay was held sufficient to discharge the debtor.

See, also:

Briggs v. Parsons, 39 Mich. 400, and
Summers v. Wood, 131 Ark. 345, 198 S. W. 692, citing 30 Cyc. 1191.

The only reason why libelants did not receive the assigned moneys was that they failed to make the necessary demand for them. Whether this was due to mere negligence on their part or to a perverse desire by further delay to enhance the penalties they expected to

recover from the vessel, is quite immaterial. The amount assigned was $12,000, more than twice $5,551.07, the amount of wages due. Libelants by their own fault having failed to realize on the assignment, the debt for wages was discharged and there is no possible basis for a penalty.

(b) There is no Allegation that the Delay in Payment was Without Sufficient Cause.

There is nothing whatever in the libel to show any facts authorizing the imposition of the penalty.

The statute imposes the penalty only where payment is delayed "without sufficient cause".

"Facts showing that the refusal was without sufficient cause" must be pleaded in the libel.

The Express, 129 Fed. 655, 656.

> "The rule obtains as well in admiralty as in other cases that the proof cannot avail a party further than it corresponds with the allegations of the pleadings. In The Rhode Island, 20 Fed. Cas. 648, No. 11,745, it was said:
>
> 'A cardinal principle in admiralty proceedings is that proofs cannot avail a party further than they are in correspondence with the allegations of his pleadings, and that the decree of the court must be in consonance with the pleadings and proofs. Wood, Civ. Law 377; *The Hoppet v. U. S.,* 7 Cranch 389 (3 L. Ed. 380); *Treadwell v. Joseph,* Fed. Cas. No. 14,157; *Jenks v. Lewis,* Fed. Cas. No. 7,280; *The Wm. Harris,* Fed. Cas. No. 17,695. Whatever may be the case then upon the evidence on the one side or the other, the judgment of the court must be restrained and guided by the allegations in issue; and, if they are insufficient to maintain the right of either party as established by the proofs, or the two stand

> in conflict, an amendment must be obtained, or the court will be compelled to pronounce its decision *secundum allegata et probata,* disregarding all evidence not brought within the fair and reasonable scope of the pleadings.' ''
>
> *Second Pool Coal Co. v. People's Coal Co.,* 188 Fed. 892, 895.

See, also,

The Ogeechee, 248 Fed. 803, 807.

In the present case, indeed, the libel, instead of pleading facts authorizing the imposition of the penalty, pleads facts which show that the penalty is utterly inapplicable.

The statute imposes the penalty only for refusal or neglect to pay ''in the manner hereinbefore specified''. And so far as voyages from the Atlantic to the Pacific are concerned, the section in question only specifies that payment shall be made ''within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged whichever happened first''.

As we have seen, the cargo was discharged March 17, 1921, and the wages became due March 18, 1921.

But the libel, filed March 15, 1921, necessarily had to proceed on the theory that the wages had become due, in some other way before that time, and therefore pleaded that libelants ''are no longer bound to continue with the said vessel'' (apostles, p. 15).

Granting, for the moment, that this is true, and that libelants had the right to terminate their employment and declare their wages due prior to the date fixed by the

statute, nevertheless it must follow that, if the wages became due in this way, the statutory penalty cannot be applied.

On libelants' own pleading, therefore, no penalty should have been imposed.

(c) The Effect of the Decree is to Penalize, not the Owners of the Vessel, but Those Having Liens Upon Her.

The statute imposes the penalty upon

> "Every *master* or *owner* who refuses or neglects to make payment," etc.

The *master* is not a party to the present proceeding.

The *equitable owner,* Pacific Motorship Company, is not a party.

The *legal owner,* Anglo-California Trust Company, claimant and appellant, has no beneficial interest in the vessel, and is interested only as trustee.

The decree of the District Court, imposing the penalty not upon the *master* or *owner,* as the statute requires, but upon the *vessel,* which the statute does not authorize, really penalized the *mortgagee* W. E. Gerber, Jr., the intervening libelant and appellant, and also the holders of maritime liens junior to the wage claim but superior to the mortgage, if such claims should aggregate the value of the vessel.

In this circuit, indeed, it has been intimated that this penalty cannot be recovered in a proceeding *in rem* against the vessel, since the statute only creates a personal liability of the master and owner.

The General McPherson, 100 Fed. 860, 864.

The district judge answered this by quoting the language of the statute making the penalty

> "recoverable as wages in any claim made before the court". (Apostles, p. 227.)

Of course this simply means "in any claim made before the court against the master or owner". For this language, relating merely to the *procedural* matter of how the penalty should be enforced cannot be construed as creating new and different *substantive* liabilities.

But even assuming that this language can properly be construed as permitting the recovery of the penalty in a proceeding *in rem,* such recovery can only be permitted when its effect would be to impose the penalty upon the persons designated by the statute as liable for it, the master and owner. Certainly where, as in the present case, there are innocent lienholders to an aggregate greater than the value of the vessel, a decree making the penalty a prior lien on the vessel is not even a substantial compliance with the statute, but actually imposes the penalty upon innocent persons not contemplated by Congress at all.

No authority has been cited that innocent creditors are to be penalized in this way for their debtor's fault.

As we have shown, the employer did not withhold these wages arbitrarily, or oppressively. Its only fault was its financial inability to pay its debts. Extraordinary as the decision of the District Court may seem, that a penalty is due under such circumstances, it becomes doubly so when we consider that this decision

imposes the penalty, not on the employer whose insolvency caused the delay in payment, but on the other creditors. These other creditors, in no way responsible for their debtor's financial reverses, and already suffering on account of their inability to collect their claims in full, are required to pay this penalty to the libelants, who are the only creditors that cannot suffer by the insolvency, since they have a prior lien on the vessel.

No such unreasonable intention can be imputed to Congress.

IV. The amount of the penalty is computed wrongly.

The libelants were hired and paid by the month (apostles, pp. 443-445). In computing the penalty the District Court divided the monthly rates of pay by thirty, to obtain a daily rate. It then determined that between March 17, 1921, and May 17, 1921, there were sixty-one days (since March had 31) and multiplied this figure by twice the daily rate obtained as above. The result is that the court awarded to each man double pay for two months, *plus* one day.

To compute it properly the court should have recognized that the wages were not due until March 18, 1921 (*supra,* p. 30). This makes the period of the penalty up to May 17, 1921, only two months *less* one day.

The decree is, therefore, erroneous in that it awards each libelant four days' pay too much, the total amount of the error being $1,431.98.

The following table shows the details as applied to each man:

Name	Monthly Wage	Daily Wage	Penalty Under Decree	Correct Computation
Richard J. Spencer	222.50	7.42	905.24	875.16
C. V. Miller	193.75	6.46	788.12	762.08
R. H. Councill	170.00	5.67	691.74	668.66
Tim Harrigan	95.00	3.17	386.74	373.66
Franklin Adrean, Jr.	85.00	2.83	345.26	334.34
Frank Garlock	85.00	2.83	345.26	334.34
Birger Johansen	85.00	2.83	345.26	334.34
Fritz Shilling	85.00	2.83	345.26	334.34
Axel Johnsson	85.00	2.83	345.26	334.34
John Lahtimen	85.00	2.83	345.26	334.34
William H. Crawford	318.75	10.63	1,296.86	1,253.74
J. B. Hughes	222.50	7.42	905.24	875.16
Walter S. Austin	193.75	6.46	788.12	762.08
Leon A. Carter	170.00	5.67	691.74	668.66
Campbell A. Hobson	95.00	3.17	386.74	373.66
W. Owens	95.00	3.17	386.74	373.66
W. C. Ward	95.00	3.17	386.74	373.66
N. E. Austin	100.00	3.33	406.26	393.34
Charles V. Smith	75.00	2.50	305.00	295.00
H. D. Wright	135.00	4.50	549.00	531.00
Robert Dougle	115.00	3.83	467.26	452.34
John Lopez	100.00	3.33	406.26	393.34
William Ovid	70.00	2.33	284.26	275.34
S. J. Ryan	70.00	2.33	284.26	275.34
G. Garfield	70.00	2.33	284.26	275.34
D. W. Davis	125.00	4.17	508.74	491.66
Total			13,180.88	11,748.90
Difference				1,431.9

SECOND: LIBELANTS SHOULD HAVE ACCEPTED THE TRANSPORTATION OFFERED BY GERBER AND NOT RECOVERED MONEY IN LIEU THEREOF.

The articles provide for *transportation,* and not *money* in lieu thereof (apostles, pp. 222, 440).

The district judge recognized this, and directed a decree giving transportation, only

"for all such as desire to return to the home port".

(Apostles, p. 228.)

The interlocutory decree is for *transportation*

"for each of the libelants desiring such transportation".

(Apostles, p. 233.)

The final decree, however, is that:

"If said transportation and subsistence are not furnished to said libelants upon satisfaction of the foregoing provisions of this decree that in *lieu thereof* each of said libelants shall receive the *amount* set opposite their respective names, to wit:

Richard J. Spencer	$175.66
C. V. Miller	175.66
R. H. Councill	175.66
Tim Harrigan	168.77
Franklin Adrean, Jr.	168.77
Frank Garlock	168.77
Birger Johansen	168.77
Fritz Shilling	168.77
Axel Johnsson	168.77
John Lahtimen	168.77
Walter S. Austin	175.66
Leon A. Carter	175.66
Campbell A. Hobson	168.77
W. Owens	168.77
W. C. Ward	168.77
N. E. Austin	175.66
Charles V. Smith	168.77
H. D. Wright	175.66
Robert Dougle	168.77
John Lopez	168.77
William Ovid	168.77
S. J. Ryan	168.77
G. Garfield	168.77
D. W. Davis	175.66

"It is further ordered that if any of said libelants shall have furnished their own transportation and

subsistence to said Baltimore, Maryland, prior to payment and/or satisfaction of this decree, that he *shall be paid the sum* last hereinabove set opposite his name in addition to the amounts hereinabove set forth.''

(Apostles, pp. 253-254.)

As so drawn, it postpones our right to furnish *transportation* until libelants shall see fit to satisfy the decree, and gives libelants the right to return to Baltimore, perhaps under employment on another vessel without cost to themselves, and then to recover a *money* judgment for the specific sums set forth.

As it stands it is not clear whether the decree is for *money* or for *transportation* in kind.

Appellant Gerber has tendered the *transportation* in kind. (Apostles, pp. 45, 244.) It is submitted that libelants should have been required to accept this tender and that they should not have a right to a *money* decree on this score.

THIRD: IT WAS IMPROPER TO ENTER A DECREE FOR THE SALE OF THE VESSEL UNDER A JUNIOR LIBEL WITHOUT CONSOLIDATING IT WITH EARLIER LIBELS AND INTERVENING LIBELS UNDER WHICH THE VESSEL IS HELD BY THE MARSHAL, AND WITHOUT NOTICE TO THESE LIBELANTS AND INTERVENING LIBELANTS.

The libel itself sets forth:

''That the said vessel is now in the Bay of San Francisco, and is in charge of a keeper under libels now pending against it in the above entitled court.''

(Apostles, p. 15.)

These libels were in the proceeding numbered 17,116 brought by McIntosh & Seymour Corporation, in which Henry C. Peterson, Incorporated, E. C. Genereaux, and Pacific Steam Navigation Company intervened. (Apostles, p. 270.)

In addition there were No. 17,119, brought by West, Elliot & Gordon (apostles, pp. 286-287), and No. 17,129, brought by R. Jepsen (apostles, p. 291).

These proceedings, as well as that later brought by the master (apostles, pp. 296-297), were all in form *in rem,* with the object of obtaining a decree for a sale of the vessel, free of all claims, to satisfy the causes of action set up by the various parties. No stipulation was ever given for the release of the vessel in any of these proceedings.

It cannot be contended that, while the vessel is in the custody of the marshal under a prior libel *in rem,* a separate proceeding *in rem* may be prosecuted against the same *res.*

> "When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property.

In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application and not peculiar to the relations of the courts of the United States to the courts of the States; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the States and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the States of the Union. Hagan v. Lucas, 10 Pet. 400; Williams v. Benedict, 8 How. 107; Wiswall v. Sampson, 14 How. 52; Peale v. Phipps, 14 How. 368; Pulliam v. Osborne, 17 How. 471; Taylor v. Carryl, 20 How. 583; Freeman v. Howe, 24 How. 450; Buck v. Colbath, 3 Wall. 334; Yonley v. Lavender, 21 Wall. 276; People's Bank v. Calhoun, 102 U. S. 256; Barton v. Barbour, 104 U. S. 126; Krippendorf v. Hyde, 110 U. S. 276; Pacific R. R. of Missouri v. Missouri Pacific Railway, 111 U. S. 505; Covell v. Heyman, 111 U. S. 176; Heidritter v. Elizabeth Oil Cloth Company, 112 U. S. 294; Gumbel v. Pitkin, 124 U. S. 131; Johnson v. Christian, 125 U. S. 642; Morgan's Co. v. Texas Central Railway, 137 U. S. 171; Porter v. Sabin, 149 U. S. 473."

Wabash Railroad v. Adelbert College, 208 U. S. 38, 54-55.

"But the extracts quoted from the mortgage and bill show clearly that immediate possession of the property by receivers now, and vendee subsequently, is sought. This cannot be had without displacing that of the present receivers, or making their possession a new one, by appointing them receivers in this cause. That their possession will not be disturbed or changed but by, or by leave of, the court appointing them is, as said in the other case, universal and elementary. No case is cited or known to the contrary.

* * * * * * * *

The substance of the whole is that those who claim the disposition or possession of property in the hands of receivers of a court must come to that court, *in that case,* to reach it, and an independent suit for that purpose cannot be maintained *even in the same court.* Leave of court to file a bill separately must be had *in the original cause,* and this annexes the new bill to that cause, and amounts to the same as filing it in that cause would."

American Loan Co. v. Central Vermont Co., 86 Fed. 390, 392.

Two proceedings *in rem* against the same *res* cannot be maintained concurrently.

It is hardly necessary to suggest the "unseemly conflicts" that would result if a contrary rule prevailed.

After a sale under the decree here appealed from the purchaser would undoubtedly claim immediate possession of the *res,* and the marshal, having made the sale, would be bound to deliver possession. But, under the process in case number 17,116, he had been commanded to attach the same *res* "and to detain the same in your custody." (Apostles, pp. 274, 282.) No order has been made in that case authorizing the release of the vessel,

and the libelant and interveners in that case would undoubtedly insist that he comply with the monitions issued in that case and hold the vessel to meet their claims.

The decree does not direct a sale subject to the claims set up in the other libels, and such a decree would not have been acceptable to libelants, who as seamen claim a prior lien. But the libelant and interveners in case number 17,116 also had liens upon the vessel, and had taken the proper steps to enforce them; the vessel was held under their libels. Surely they could not be deprived of their liens by the proceedings of libelants in this, an independent case of which they had no notice.

Or suppose a decree had been entered and sale made in case number 17,129. Would the purchaser have been entitled to possession as against the claims both of the libelants herein and of the libelant and interveners in case number 17,116? Is the practice of the admiralty court to degenerate into a scramble in which the libelant who gets the first decree has his claim paid, irrespective of the priorities laid down by the decisions?

Or suppose a decree had been rendered and a sale had in the case numbered 17,139, brought by libelants' proctor at the suit of the master (apostles, pp. 296-297), who, by the well-settled rule, had no lien whatever. Could all the other parties, who had taken the necessary steps to perfect their liens, be deprived of their rights by this proceeding, of which they had no notice whatever?

In considering this phase of the case, we must distinguish carefully between instances of successive sep-

arate proceedings *in rem* by different lien claimants, where the vessel has in each case been released on stipulation, and an attempt to institute such separate proceedings where the *res* is still in the possession of the court under the first libel. Where the *res* has been seized and released on stipulation, the proceeding *in rem* becomes essentially a controversy *in personam* between the libelant on one side and the claimant and his sureties on the other; the *res* is no longer in the custody of the court; it would be improper now for another lien claimant to intervene in what is a controversy alien to him; his remedy is to proceed against the *res* by an independent suit *in rem.* But where the *res* is still in the custory of the court, it cannot be seized again, and jurisdiction could not possibly be obtained in a separate proceeding *in rem;* the only remedy is to intervene in the original proceeding.

It must follow, therefore, that if libelants' proceeding in this case is really a separate proceeding *in rem,* in which form the libel was certainly drawn, then it must be dismissed. The libel can only be supported as an intervening libel in case number 17,116, somewhat on the reasoning adopted in receivership proceedings, where similar situations have arisen.

In one of these cases Judge Taft said:

> "It cannot be of importance that the bill was apparently filed as an independent bill. If in fact the only way of maintaining jurisdiction of it is as a dependent bill, ancillary to the creditors' action, it is the duty of the court so to treat it, pro-

vided it appear, as it does, that it can be maintained as such.''

Continental Trust Co. v. Toledo Co., 82 Fed. 642, 645.

See also

Minot v. Mastin, 95 Fed. 734, 738.

But if this view is to be taken, and the libel here is merely an intervening libel in case number 17,116, then it must follow that the decree appealed from is erroneous because it disposes only of the issues raised by this intervening libel, and leaves still pending, not only the claims filed under case number 17,116, but also those in the cases numbered 17,119 and 17,129, which must also be regarded as mere interventions in case number 17,116. There cannot be several final decrees in what is only one proceeding. Moreover, under no circumstances could the District Court dispose of the issues raised by this libel without affording the other libelants and intervening libelants an opportunity to be heard.

It is true that certain of these parties had some informal notice of the proceedings below. Thus the libelant in case number 17,119 was represented by the same proctor as appellees herein. And the proctors for the libelant and certain of the interveners in case number 17,116, hearing of the decision, were accorded a hearing *after* the District Court had already decided the case. (Apostles, p. 226.) But the libelant in 17,129, and Pacific Steam Navigation Company, one of the interveners in case number 17,116, and the holder of the largest claim, were ignored entirely.

As we have already pointed out, the intervening libelants and other holders of maritime liens are the persons most interested in the decision herein. The effect of the decree is to impose the penalty, not on the master or owner, as required by the statute, but on the other lienholders. Certain of these lienholders had taken the necessary steps to enforce their liens. They were parties to the only proceeding in which a sale of the vessel could rightfully be decreed. Without any notice to them, without giving them an opportunity to present any defense, the District Court has penalized them for no fault of theirs, for no fault of their debtors, even, but simply because their debtor had become insolvent.

It is respectfully submitted that the decree must be reversed.

Dated, San Francisco,
October 5, 1921.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellants.

OSCAR SUTRO,
FELIX T. SMITH,
Of Counsel.

(APPENDIX FOLLOWS.)

Appendix.

APPENDIX.

In the Southern Division of the United States District Court for the Northern District of California.

First Division. In Admiralty.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, C. GARFIELD, and D. W. DAVIS,

Libelants,

vs.

THE AMERICAN MOTORSHIP "BENOWA", her engines, boilers, tackle, machinery, apparel and furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY (a corporation),

Claimant.

THE COMMONWEALTH OF AUSTRALIA and WILLIAM MORRIS HUGHES, Attorney General of said The Commonwealth of Australia, for said the Commonwealth of Australia,

Intervening Libelant.

(W. E. GERBER, JR.,

Substituted Intervening Libelant.)

No. 17,132

Ira S. Lillick, Proctor for Libelants.

Pillsbury, Madison & Sutro, Proctors for Respondent and Substituted Intervening Libelant, W. E. Gerber, Jr.

Neterer, District Judge.

DECISION.

The libelants on January 21, 1921, signed shipping articles with the master of the Steamship "Benowa" at the Port of Baltimore to ship on a voyage from Port of Baltimore to via one or more coastwise ports to one or more ports on west coast of United States, and final port of discharge on the west coast of the United States, for a period of not exceeding three calendar months, "and if crew is discharged on the west coast, transportation will be paid back to Port of Baltimore, Maryland". The vessel arrived in San Francisco February 28th, and was dicharged March 17th, at the Port of San Francisco. Prior to February 28th, a receiver was appointed for the Pacific Motorship Company, claimant, who qualified on the 28th. On arrival of the vessel there was a scarcity of provisions on the Steamship "Benowa", the claimant being unable apparently to supply the same. The master and crew remained on the ship. The receiver did nothing for the physical care of the ship or for supplying of any provisions. Upon the arrival of the ship in the Port of San Francisco, demand was made upon the master for 50% of the wages earned on the voyage, and was refused by the master, it then not being determined whether discharge would be made at this port and he being unable to pay because of the financial condition of the company. The libel was filed on March 15th. The cargo was discharged March 17th. The master and crew, except two or three, remained on the vessel and discharged the routine duties of the vessel, which was lying at anchor. No provision being furnished, the

men not paid and being without means of support, on the 10th of March, 1921, the following agreement was entered into by the officers and members of the crew with J. R. Wilson, Inc.:

> "We, the undersigned officers and members of the crew of the M/S Benowa, do hereby agree to pay from our subsistence money or wages, a pro rata share of accounts, for stores supplied by the firm of J. & R. Wilson, Inc., to us, on presentation of accounts by said firm, mentioned above, upon payment to us of above subsistence or wages by our attorney, as will be due us from above named vessel.
>
> "We will authorize Mr. Spencer, 1st mate, and Mr. Crawford, chief engr., to check all accounts for us, tho in case of necessity, accounts will be open for inspection by members of the crew."

This being signed by all of the libelants, was endorsed as follows:

> "J. R. Wilson, Inc.: On the above order, I agree to withhold from any payment that may be made me for subsistence of crew and to pay you on approved bills (by Mr. Spencer and Mr. Crawford) the amount that may be due you for provisions so furnished. Ira S. Lillick, attorney for above named crew."

The receiver in his testimony as to what he did states "the only action that was taken was to address a letter to the master of the ship enclosing a notice to the crew advising them that the "Benowa" was in my hands as receiver, and notifying them that their services were no longer required, and they were ordered to get off the ship". The notice was dictated and sent out on April 1, 1921. No payment was made or tendered to

the officers or crew nor any arrangement made for their subsistence. On the 27th day of April the following tender in writing was filed in this proceeding:

> "Now comes William E. Gerber, Jr., and hereby offers to pay to libelants herein the sum of fifty-six hundred and nine and 20/100 dollars ($5609.20), being wages due to libelants in accordance with the shipping articles mentioned in the libel herein, up to and including the 17th day of March, 1921, which said sum is herewith deposited with the clerk of this court.
>
> "Said William E. Gerber, Jr., likewise offers to pay to libelants their costs heretofore incurred herein.
>
> "Said William E. Gerber, Jr., likewise offers to furnish to such of libelants as may desire the same, transportation in accordance with said shipping articles."

On May 9, 1921, the receiver was discharged and the action dismissed. On May 10th Gerber was substituted as intervenor in place and stead of the Commonwealth of Australia.

It is the contention of the libelants that they are entitled to the wages earned under the shipping articles, less amounts paid, either cash or "slop chest", together with penalty and subsistence to the time of payment, while the intervenor for the claimants contend that the only liability that should obtain is the amount of wages due; that because of the financial condition of the claimant the penalty provided by Section 4529 R. S. as amended, should not apply as "sufficient cause" to avoid the same.

The contention that the libelants are not entitled to their wages to the time of the discharge of the cargo

on March 17th, and the statutory penalty thereafter is not well founded. There is no ground for controversy with respect to the amount due. The provision of the section invoked is:

> "Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned, without sufficient cause, shall pay to the seamen a sum equal to one day's pay for each and every day payment is delayed beyond the respective periods, which sums shall be recoverable as wages in any claim made before the court."

The contention that the penalty is a personam liability and may not be impressed as a preferred lien with the wages is likewise out of harmony with the plain sense of the statute, which provides that pay for delay of payment shall be recoverable as *wages in any claim made before the court.* It is in effect an increase of wages on failure of master to promptly pay (Covert v. British Brig Wexford, 3 Fed. 577; The Charles L. Baylis, 25 Fed. 862), and when wages are earned and are due, there is no ground for controversy as to the right to receive payment (The Amazon, 144 Fed. 153). There is agreement in this case as to the amount due for wages, the only contention being that the inability of the claimant to pay because of lack of funds is "sufficient cause" to avoid the penalty. Clearly the intent of the statute is not to hold the wage earner responsible for the financial inability of the ship to meet its wage obligations. It would be manifestly unjust, in some instances inhuman, to discharge a seaman without payment of wages, without means of support, excusing a ship from the plain provisions of the statute

fixing a penalty for default which in no sense was caused by the seamen. An Admiralty Court applies the principles of equity in so far as it may be done, and in this case I think the seamen are entitled to the full amount of their unpaid wage to and including the 17th of March, and to the further sum equal to one day's pay for each and every day from said date until the entry of this decree, and for the amount of the provisions actually necessary and secured for their maintenance upon the vessel, and also for transportation together with subsistence en route for all such as desire to return to the home port. If the parties are unable to agree as to the amount or value of provisions obtained, the case will be referred to the commissioner to take testimony to determine such value.

JEREMIAH NETERER,
Judge.

Filed May 14, 1921.

No. 3749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. GERBER, JR., and ANGLO-CALIFORNIA TRUST COMPANY (a corporation),

Appellants,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Appellees.

BRIEF FOR APPELLEES.

IRA S. LILLICK,
Proctor for Appellees.

J. ARTHUR OLSON,
Of Counsel.

IN THE

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Appellees.

No. 3749

BRIEF FOR APPELLEES.

Appellant's statement of the facts, where he has stated those facts correctly, is so incomplete that to properly understand the issues submitted to the lower court, it almost necessitates reading through

the long record in the apostles. Appellant omits mention of the following salient facts:

The testimony of the master shows that the vessel put into the port of San Francisco in distress on February 28th, 1920, and that while the vessel was in the harbor of San Francisco arrangements were made for discharging her cargo at California City, on San Francisco Bay, instead of discharging her at Bremerton, Puget Sound, as originally contemplated under the contract of affreightment (apostles p. 65).

The testimony of the master further shows that four days before the vessel arrived at the port of San Francisco, she was short of provisions. Certain emergency stores were on board, and on two occasions, after the vessel had arrived in the harbor of San Francisco Bay, Mr. Moran, the port steward of the Pacific Motorship Company, the original claimant of the motorship "Benowa" herein, sent out consignments of provisions. These provisions lasted only until March 9th, 1921, upon and after which date, the master and crew in a strange port where they were without friends were thrown on their own resources and it was necessary for them to shift for themselves (apostles p. 65).

Repeated demands upon the Pacific Motorship Company to furnish them with food and supplies were unavailing. On March 9th, the captain applied to Mr. Ringwood, the president of the

Pacific Motorship Company, for supplies and provisions for the crew and he was referred to Mr. Moran, the port steward. The master informed Mr. Ringwood that he had already talked to Mr. Moran and Mr. Ringwood replied—"Well, don't talk to me any more. I do not want to see you around the office". Upon going to Mr. Moran again, the master was advised by him that he could do nothing for the crew. Prior to this particular conversation with Mr. Ringwood, the master had demanded from him money with which to pay the crew the one-half of their wages then due which they were entitled to receive upon arrival in a port of voyage. This demand was also refused. Upon this refusal, the master and certain members and representatives of the crew applied to Mr. Walter McArthur, the United States Shipping Commissioner at the port of San Francisco for aid. The Shipping Commissioner, telephoned to the office of the Pacific Motorship Company and asked for Mr. Ringwood. Mr. Ringwood apparently did not wish to talk to the Shipping Commissioner, and referred him to Mr. Moran, who, at the request of the Shipping Commissioner, called at his office (apostles p. 193, 194). There, Mr. Moran was asked if he could supply the crew with provisions at once and he replied that he could not because the company could not secure credit and that they did not have any money in the treasury. Upon the company's refusal to either supply provisions or arrange for credit for provisions, the master and

crew, with the aid of their proctor, made arrangements with J. & R. Wilson & Co., wholesale grocers, for supplies. It was agreed that the supplies should be paid for out of the allowance for subsistence the men expected to recover through this proceeding. At the time of making the demand for subsistence and wages, demand was also made for transportation in accordance with the provisions of the shipping articles. When the master made these various demands at the office of the Pacific Motorship Company, he was always referred to the port steward, or the auditor, and no attempt of any kind, so far as the officers and/or the crew have been advised, was made by the officers of the company or any one in its behalf to furnish credit or provisions to the crew. The record is absolutely lacking in any showing that attempts were made by the Pacific Motorship Company or anyone else in privity with it either to raise money to pay the crew or to provide them with food. We have only the testimony adduced by the appellants that they were without funds and had no credit. They might not have had credit for money to be used for other purposes but with the security they had of the first lien upon the vessel obtainable possibly through the use of the money for the specific purpose of caring for this crew how could appellants have known until they or their predecessors tried what could be done?

On page 4 of brief for appellants, counsel states that Pacific Motorship Company assigned to libelant's proctor, as trustee, $12,000 to meet the

claims of libelants and telegraphed to Washington directions to pay this sum to libelant's proctor who, at the same time, telegraphed his acceptance of the assignment. This statement is clearly misleading and apparently an attempt to have this court believe that the Pacific Motorship Company voluntarily took steps to obtain money with which to pay the wages due the crew. The record clearly shows that on March 16, 1921, proctor for appellees telegraphed the Navy Disbursing office to withhold from payment the freight monies due upon the cargo of coal carried by the motorship "Benowa" and thereafter, on the next day, when the Pacific Motorship Company ascertained that apparently the payment of this freight money would be withheld, telegraphed on in an endeavor to obtain its release. Thereupon the telegram of March 17th, 1921 (apostles p. 476) was sent to Edwin H. Duff. Notwithstanding the absolutely unjustifiable insult of counsel for appellants in charging counsel for appellees with delay in the proceedings of this case so that any judgment obtainable might be enhanced by reason of a possible penalty because of the nonpayment of wages, it clearly appears from the record that as early as March 17th, 1921, counsel took every possible step to secure the wages due the officers and the crew, and on account of their dire needs attempted to provide them with necessaries for themselves and families by endeavoring to arrange so that the wages might be paid to them from the freight mon-

ies due from the United States Navy department. No assignment whatever was made of any freight monies and the statement made by W. L. Comyn is only a conclusion upon his part and there is no evidence in the record to show that an assignment was made or that an acceptance of any assignment was given by proctor for appellees. Had the assignment been made, as counsel would have this court believe, it would have been introduced in evidence, and would have been a part of the record.

Counsel, on page 7 of their brief, state that the clerk has omitted the decision of Judge Neterer from the apostles. The decision which counsel refers to was expunged from the record by reason of the fact that Judge Neterer, in writing it apparently had the old statutes before him covering the non-payment of wages providing that seamen are entitled to a sum equal to one day's pay for each day that payment of wages are withheld, whereas now the statute provides for a sum equal to two day's pay for each and every day payment is withheld. In the later decision the last two lines are:

> "This decision is to supersede that filed on May 14, 1921, which is hereby expunged from the record" (apostles p. 228).

The quotations on page 7 of counsel's brief and the appendix to their brief are not a part of the record. The clerk properly omitted the opinion as the court had ordered it expunged. The decision of Judge Neterer was referred to by him as a supplemental decision, but this was a misnomer on his

part, for the reason that it is the only decision in the case, the former one having been expunged from the record.

Counsel for appellant state that on May 17th, 1921, the day upon which the decision was filed, it was agreed between counsel and Judge Neterer that no penalty should be imposed for any delay subsequent to that day. Feeling, as we do, that a controversy between counsel as to what the facts are should have no weight with this court, still we cannot leave such a statement unchallenged when it is not in accord with the facts. Upon the evening of the day the decision was filed, Judge Neterer was leaving for Seattle. Counsel could not agree upon the form of the decree, and it was suggested by the court that possibly counsel would waive the penalty for any date beyond May 17th, 1921, providing that the amount of money then in the registry of the court, and which had been deposited therein by the substitute claimants herein, be paid to the officers and the crew without prejudice to any rights which they might have under the decree. Counsel could not stipulate away any rights which the appellees herein might have under the decree and it was for the court to say whether or not the penalty should stop upon the date of the decree, or whether it should continue until the wages were paid.

We will take up the arguments in appellants' brief in the same order in which they there appear. Counsel claim that when they made their tender

of the wages due to March 17th, 1921, under date of April 27th, 1921, that the penalty provided by the statute should then stop. The decisions clearly hold that this so-called penalty is a liquidated amount which is to cover the wages which the seamen earn and a sum sufficient to pay their expenses. The reason for the rule being that seamen might by necessity feel compelled to compromise valid claims for amounts for wages rightfully due them when they were in a foreign port or many miles from home. This two days' pay for one is not in fact a penalty, but only an allowance for expenses in addition to the wages they should receive during the period which they are forced to remain idle while seeking other employment, or while being forced to wait until their just demands are satisfied. Had the crew accepted the tender made by the appellants, they would have been without any remedy for the time they had lost from March 17th to April 27th, which is a period of forty days. During all of this period these men in a city where they were unknown had been providing their own provisions with credit which they had obtained without any assistance whatever from the owners of the motorship "Benowa". Counsel has cited no authority to substantiate their claim in this regard and we submit that this argument is unsound. To uphold this contention would be to disregard the very purposes for which the statute was enacted. This court in the recent case of *Vincent et al v. United States et al*, 272 Fed. 889, disposed of this question.

Section 4529 of the Revised Statutes of the United States, among other things provide that,

> "Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned, without sufficient cause, shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court."

This clearly shows that the tender made by appellants was not sufficient. The amount due the men was their wages up to and including March 17th, 1921, and a sum equal to two days' pay for one from said March 17th up to and including the date of tender. Counsel then try to shift the responsibility for the delay in payment after April 27th, to the refusal of the appellants to accept the amount of wages, together with transportation, etc., provided in the Articles which they should have received on March 17th. We feel confident that this court will not support the contention that the tender that was made on April 27th, 1921, was in an amount that freed appellants from further liability of Sections 4529 or 4530 of the Revised Statutes of the United States.

Counsel further argue that the penalty under the provisions is imposed by the statute for the refusal to pay wages and not for the refusal to meet all demands which seamen may see fit to make. The answer to this contention is clearly made in an opinion written by Judge Choate, in the case of

Covert v. British Brig "Wexford", 3 Fed. Rep. 577, where, after commenting on the English statutes, which are similar to the ones here in question, the court said:

> "We have a similar provision in our own Act. These statutes are designed for the protection of seamen to prevent the abuse of withholding their pay and thereby keeping them in port at expense and out of employment while waiting for settlement. It is a liquidation of indemnity for such enforced expense and delay."

Here, again, counsel for appellants attempt to make this court believe that demands were made by the appellees which were disallowed by the lower court. The schedule attached to the libel includes an amount sufficient to cover transportation, and subsistence during the transportation, and from those amounts are deducted: (1) such amounts as may have been advanced to any of the members of the crew and (2) amounts charged against the accounts of the men for supplies from the slop chest of the vessel.

We assert, without fear of contradiction, that the wages demanded by the crew upon their arrival, were the wages due them under the shipping articles. The schedule attached to the libel lists the claim of each libelant and includes the wages due, transportation, and subsistence during time of transportation. The decree provides for the amount of wages less any credits charged against the libelants, with transportation and subsistence as a sep-

arate item. This accounts for the apparent discrepancy which counsel have pointed out and in trying to make the most of it referred to in numerous occasions in their brief. This palpable attempt to make this court believe that the payment of the wages was not made because there was a dispute as to the amount that was due the officers and the crew, will, we are sure, be unsuccessful.

It also appears from the record that it was stipulated that no payment of wages had been made to any of the officers or members of the crew for services performed under the shipping articles, save and except that there were certain advances made to some of the crew (apostles p. 61). Counsel cannot point to any part of the record where any question was made as to the amount the libelants were entitled to receive from the Pacific Motorship Company when they made their demands for the wages due them. There is not a scintilla of evidence in the record that the amounts demanded by the men were not due them. We cannot but feel that counsels' discussion of the point in their brief is a wilful attempt to confuse the facts and mislead the court.

Counsel argue that no penalty should be imposed for any period subsequent to March 26th, 1921, the date of the appointment of the receiver. This argument is answered by the finding of Judge Neterer in his opinion:

> "The fact that a receiver was appointed for the claimant cannot shift the burden for non-

> payment from the ship to the wage earner, especially where the ship was already in the custody of the admiralty court. I know of no case, and none has been called to my attention where a contrary rule has been announced in this or any other District upon a like state of facts."

The appointment of the receiver did not prevent application being made to the court to relieve the situation in which the officers and crew of this vessel found themselves. The receiver could have taken such steps as were necessary to conserve the assets of the Pacific Motorship Company, but the testimony shows that he did nothing to assist the libelants in the position in which they found themselves. In his testimony (apostles page 94) in answer to the question:

> "What did you do with respect to the motorship 'Benowa', upon qualifying as such Receiver? Answer: The only action that was taken was to address a letter to the master of the ship enclosing a notice to the crew advising them that the 'Benowa' was in my hands as the Receiver, and notifying them that their services were no longer required and they were notified to get off the ship."

This is the kind of treatment which the crew received from the time the vessel first arrived at San Francisco. By their attention to their duties and performing the services which they had agreed to perform, and after bringing the "Benowa" safely into port in San Francisco, the Pacific Motorship Company and the gentlemen interested therein ap-

parently expected them to take to the streets without a cent in their pockets and with no provision whatever for their return to the port from which they had shipped. Nothing whatever was done for them, although everything possible seems to have been done by the Pacific Motorship Company, or those in charge of its property to protect and conserve that property. No expense has apparently been spared to conserve its assets. If the Pacific Motorship Company had attempted through the receiver to do something to relieve the situation it could have obtained aid for the men. It did not do so. Counsel argues that no penalty should be imposed because of the financial condition of the Pacific Motorship Company. He argues that the burden of the responsibility for the non-payment of these wages should fall upon the seamen rather than the owner of the vessel, or upon any one else who might be interested in the venture by reason of equitable or other claims. This burden could not fall upon any of the other lien claimants, for the reason that the appellants have filed a supersedeas bond covering the amount awarded in the decree herein (apostles 418-422). The intent of the framers of the statutes providing for increase of wages in cases of this character was to compel owners of vessels to take the necessary steps to be prepared to pay the wages provided for in the shipping articles. Had the owners of the Motorship "Benowa" in this case taken the necessary preliminary steps to insure the governments withhold-

ing such amount as might have been required to pay the wages to become due, out of the freight monies, it could have done so. From the facts as they appear in the record, the Pacific Motorship Company must have known of its financial condition for some time prior to the arrival of the motorship "Benowa" at San Francisco.

Appellants claim that libelants commenced their proceedings for the collection of the wages before payment of these wages was due. The record shows that the vessel arrived in San Francisco on February 28th, 1921. The voyage ended here. Demand was then made for one-half of the wages then due, and continuously made thereafter (apostles pp. 119, 168, 169).

These undisputed facts bring the case clearly within the provisions of the following sections of the Revised Statutes:

Sec. 4529:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens, and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every

master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage."

Sec. 4530:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void; Provided, Such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section forty-five hundred and twenty-nine of the Revised Statutes; Provided further, That notwithstanding any release signed by any seaman under section forty-five hundred and fifty-two of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require; And provided further, That this section shall apply to seamen on foreign vessels while in harbors

> of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

In *Burns v. Fred L. Davis Co.,* 271 Fed. at p. 444 seamen's wages were withheld because an attachment issuing out of the state court was served upon the owner of the vessel attaching those wages. No state statute, (even had such a statute any binding force in view of sec. 12 of the Revised Statute (38 Stat. at Large, s. 153, p. 1169 [comp. st. § 8325a] forbidding the attachment of wages due a sailor) of Massachusetts permitted such an attachment and the court said:

> "The remaining question under Section 3 of the Act of 1915 is whether the libelee in withholding the wages acted without sufficient cause. He says that he was justified in declining to pay the wages for the reason that he was in duty bound to recognize the authority of the process of the District Court. If his position is right in this respect, then the provisions of the Federal law enacted for the benefit of seamen and in the exercise of its maritime power may at any time be set at naught by a state process and its provisions rendered valueless. * * * Under the circumstances we think the conclusion should be that the libelee withheld the wages without sufficient cause and that the libelant should recover the additional pay contemplated by the statute and his costs."

In the *Chas. L. Baylis,* 25 Fed. Rep. p. 862, Judge Brown commenting on the extra pay provided by the statute, said:

> "But the extra pay provided by the statute is an incident to their claim of wages proper and ranks with their wages as a prior lien."

Appellants have cited numerous cases to uphold their contention that this increase of wages is a penalty. We submit that the authorities generally show conclusively that this is intended as liquidated damages to cover the expenses and losses which are forced upon seamen without any fault or neglect on their part.

Appellants in citing the case of the *General McPherson* in 100 Fed. Rep. 860-864, quote a portion of one sentence in the opinion but do not state the facts or enough of the opinion to correctly express the holding of the court. Reading the portion quoted would lead one to believe that the case holds that inability to command the money necessary to pay off a crew is sufficient cause to relieve an owner from liability. Such is not the opinion of the court. In that case the owner of the vessel went to heavy expense to bring the vessel within the reach of judicial process of all the claimants having any liens against the vessel. The libelant had also joined the vessel when he himself was far away from home and desirous of going to his home town where, after he had been discharged, he had, in the meantime, sought and obtained other employment and had been earning wages in that other employment. In this case, no such equitable facts appear. On the contrary, the men were brought from Baltimore on the Atlantic Coast to the Pacific Coast and left stranded without any means of support. They did not even receive the assistance of the owners of the vessel in obtaining credit or subsistence

of any kind. They were absolutely ignored. Worse than ignored. Mr. Ringwood, the president, when the master called upon him for aid for his crew said: "Well, don't talk to me any more, I don't want to see you around the office"(apostles p. 64, 65.)

The paragraph containing the essential facts and findings of the court in the *General McPherson* and from which appellants have quoted a portion of one sentence, is:

> "1. As to the claim of the libelant Graham of a right to recover wages after he was discharged from the vessel until the time of final payment, there is a serious question in my mind whether the statute authorizing such recovery is to be regarded as a penal statute, to be given a strict consideration, which would require a seaman to enforce the penalty by a suit in personam against the master or owner. The statute requires the master or owner to pay a sum equal to one day's wages for each day's delay, but it does not in specific terms subject the vessel to a lien for this penalty, nor authorize its collection by a suit in rem. However, this question has not been argued before me, and I do not at this time intend to decide it. A seaman is only entitled to recover this additional pay when his wages shall have been withheld without sufficient cause, and I hold that, in view of the heavy losses sustained by the owners in recovering possession of their vessel and bringing her within reach of judicial process, so that all having claims against her might be protected, their inability to command the money necessary to pay off the crew is sufficient cause to relieve them from liability under this statute. The $1000 which Mr. Phil-

> lips possessed would have been almost entirely absorbed if it had been devoted to paying the crew of the vessel, and I consider that he was justified in keeping that amount of money for other uses. Mr. Graham joined the vessel when she was in the far north, and presumably he was anxious to come to Seattle, where his home is. After leaving her, and while this suit has been pending, he has been earning wages in other employment. Under all these circumstances, I consider that it would be an injustice to allow him any amount in addition to what he has already received."

The case of the *Wenonah,* Fed. case No. 17412, cited by counsel, does not uphold the contention asserted in the brief. The court in that case held that, where a vessel was wrecked and sold in a foreign port under the statutes which were then in existence and referred to in said case, the owners were not put under the obligation of sending an additional amount of money, over and above the amount realized from the sale of the vessel, to satisfy a decree for the increased wages provided for therein. Neither the facts nor the law in that case are pertinent to the questions involved herein.

The appointment of a receiver for the Pacific Motorship Company did not divest the admiralty court from jurisdiction over the motorship "Benowa"; it having obtained jurisdiction thereof prior to the appointment of the receiver.

In the case of *The Philomena,* 200 Fed. 859, a petition in bankruptcy was filed by the owner of the vessel September 14, 1911, and a receiver was ap-

pointed October 7, 1911. On September 9, 1911 a libel in admiralty was filed for repairs and supplies furnished to the vessel and the vessel was arrested on that day. On October 11, the receiver filed a claim to the vessel and asked that the possession of the vessel, or its proceeds, be delivered to him. The court, after noting that admiralty courts have exclusive jurisdiction for the enforcement of maritime liens, says:

> "But it is settled that the admiralty courts have exclusive jurisdiction over maritime liens, and that as other courts are without power to establish and enforce such liens, so they are without power to displace them. Moran v. Sturges, 154 U. S. 263, 14 Sup. Ct. 1019, 38 L. Ed. 981; Paxson v. Cunningham, 63 Fed. 132, 11 C. C. A. 111; Hudson v. New York, etc., Co., 180 Fed. 973, 104 C. C. A. 129. It was said in Paxson v. Cunningham that an 'admiralty court has peculiar rules of its own in some respects, which cannot be conveniently, if at all, applied by a court of equity or common law.' 63 Fed. 134, 11 C. C. A. 113. It may well be that under the present Bankruptcy Act a bankruptcy court would encounter less difficulty in this respect than a court of equity or common law; but the fact remains that no admiralty jurisdiction has been given to courts of bankruptcy. Their powers over the bankrupt's property, once their jurisdiction has attached, and their power to determine questions regarding liens thereon, however strongly these may be stated (see Carter v. Hobbs (D. C.) 92 Fed. 594, Staunton v. Wooden, 179 Fed. 61, 63, 102 C. C. A. 355, and cases there cited), do not go to that extent. The admiralty court, therefore, cannot refuse to proceed, in an admiralty suit properly before it, wherein its jurisdiction

over the property was complete before the bankruptcy proceedings were inaugurated; nor can it require the libelant, in order to get his lien established, to present and prosecute his claim in proceedings which, though also before it, are not proceedings wherein admiralty jurisdiction can be exercised. A materialman in such a suit is not to be regarded as prosecuting a claim provable in bankruptcy, but as asserting a right in the vessel libeled, irrespective of her ownership. He has the right in an admiralty court to be so regarded, and it is a right of which the court cannot deprive him. That his libel is filed within four months prior to the bankruptcy petition can in no event affect the question, because he does not obtain his lien by filing his libel, but seeks thereby to establish a pre-existing right.

To grant the receiver's application would be to make the proceeds of this vessel's sale, which now constitute the fund from which maritime liens upon her are to be paid in the order of their priority under the maritime law, chargeable, before applying any of them to the satisfaction of such liens, with a share of the expense of administering the estate in bankruptcy. If this might properly be done when admiralty proceedings are had by consent of a bankruptcy court after its jurisdiction over the property has attached, as in Re Hughes (D. C.) 170 Fed. 809, I do not think it can be done with justice to the lien claimants when the admiralty court has acquired jurisdiction first, and it cannot be said that the entire vessel constitutes part of the estate which is to be administered in bankruptcy. Under such circumstances it seems to me that the bankruptcy court cannot administer, nor its trustee take title to, anything more than the bankrupt's interest in the vessel, which will be only so much of her or her proceeds as may be left after the maritime liens are satisfied."

The Pacific Motorship Company introduced evidence to the effect that the Commonwealth of Australia had a mortgage upon this vessel. Of what materiality is it to the crew that the Commonwealth of Australia had a financial interest at stake in the vessels of this company? A mortgage upon a vessel, unless executed under the terms of the Jones Act does not even give to the mortgagee an admiralty lien upon the vessel.

It is the duty of a company operating a vessel, when it sends a crew upon a voyage, to provide for funds to meet the payment of the wages due them. The terms of the Shipping Act quoted herein are clear and unmistakable in their meaning. So careful was Congress to protect the rights of seamen in this regard, that the provisions were so drafted as to entitle the crew to receive two days' pay for one for each day that their wages should be unjustly withheld from them.

These provisions of the Revised Statutes of the United States have been uniformly followed and upheld.

The case of *Pacific Mail S. S. Co. v. Schmidt,* 241 U. S. 92, originated in this district. It was decided by Judge M. T. Dooling and his opinion appears in 209 Fed. at page 264—This court affirmed that decision.

So much stress has been laid upon the receivership proceedings that we deem it necessary to again refer to this subject. The claim of the Common-

wealth of Australia, the plaintiff in the suit in which the receiver was appointed, is inferior to that of the libelants in this case. This vessel arrived at the port of San Francisco on the 28th day of February, 1921. Continual demands from that time on were made for one-half of the wages due the libelants within twenty-four hours after its arrival, and subsequent demands were made upon the master and owners of the vessel (apostles pp. 119, 168, 169). The complaint of the Commonwealth of Australia against the Pacific Motorship Company was filed on the 7th day of March, 1921, and the receiver was appointed thereafter on March 26th, and qualified on March 28th. There is no showing whatever that funds could not be raised to pay the crew, but, on the other hand, it is clearly shown that prior to anything whatever being done or attempted to be done for the crew, the claim of the Commonwealth of Australia for $1,625,000. was purchased and there can be no question but that this was done in behalf of the owners or some person or firm interested in the company. Where a claim of this amount has been purchased, even though we have no testimony as to the amount of the consideration, and later the purchaser makes an offer of $5609.20 to this crew, and accompanies that offer with an actual payment of the amount into court can there be any doubt but that sufficient funds to pay this crew could have been obtained when demand was made, if the owners had in good faith sought to secure it? It seems to us that the

only argument that our opponents can use is that they have brought themselves within the terms of the Statute as to "sufficient cause" by attempting to make this court believe that they had no money to pay this crew, and could not raise any. The fact is that the sole effort, as we see the situation, was directed toward extricating the vessels from the difficulty brought about by the application for a receiver, and the condition of the crew was ignored. A reading of the record here will lead anyone to the conclusion that Mr. Gerber, the "volunteer" who has purchased the claim of the Commonwealth of Australia, who has made the tender of $5609.20, is but the mouthpiece of the owners of this vessel, or moneyed interests brought into the matter through the influence of Mr. Comyn, or the Pacific Motorship Company. We need but point to the fact that the same attorney representing Mr. Gerber apparently represented Mr. Comyn. On the other hand, the crew remained with the vessel and protected it and took care of it in every possible manner. The very purpose of the Statute providing that the crew shall be paid immediately when their wages or any portion become due, is to prevent their being forced into a compromising position on account of the financial difficulties which they might find themselves in when stranded in a port away from home. Until we had seen counsel's brief in this court, no question had been raised in reference to the amount of wages due the seamen, nor had there been at any time any con-

troversy over their being entitled to their wages, but because of other persons or firms having inferior liens and asserting their claims, the owners of the vessel are seeking to depend upon this as a justifiable excuse for refusing payment of the wages to the crew. It was well known to the owners of the vessel, and would have been to anyone holding a mortgage upon the vessel, that in the event of the sale of the vessel, the claim of the seamen would be paid first, and had there been any reasonable effort whatever by the owners of the vessel to obtain funds for the payment of the crew, we submit that that could have been accomplished.

In the case of the *Cubadist,* 252 Fed. 662, the court says:

> "What, then, is meant by the words, 'without sufficient cause'? There are numerous instances where masters have been known to wilfully refuse to pay seamen their wages. In these cases I think it unquestionable that if the seaman recovers he should also recover double pay. There are, however, other cases where the master may have just cause to doubt whether the seaman is entitled to demand his pay, or cases where it may be a very close question. I do not think that the Statute was intended to penalize any master or vessel for exercising sound judgment and discretion or to require them to surrender such judgment under a penalty of double pay. I think the language used carries with it the idea that where the court finds that the master's refusal was wilful and without justification or excuse, double pay should be given, but where the master was exercising a reasonable and proper discretion and the question was doubtful, it reserves to the

court the power to pass upon the question of the reasonableness or the sufficiency of the excuse of the master and give or deny the double pay accordingly as the court may find the contention of the master to be honest or a mere pretext."

In the same opinion on page 663, the court says:

"I have gone more into detail in discussing the various contentions made as to the proper construction of these two sections because neither I nor the proctors in this case have been able to find any construction by other courts of these statutes in this respect, although these proctors have searched diligently for such construction. I have given the conclusions I reached and the reasons which prompted me to reach them, hoping that other judges, as the questions may arise before them, will criticize and correct or amplify them as their experience and judgment may indicate."

In the case of the *City of Montgomery,* 210 Fed. at pages 675 and 676, Judge Meyer, in his opinion, states:

"It is claimed that the provisions of this statute may be waived. and in support of this view claimant cites The Lillian, (D. C.) 131 Fed. 375, and The Joseph B. Thomas, (D. C.) 136 Fed. 693, and Id. (C. C. A.) 148 Fed. 762. I think these cases are distinguishable from that at bar, but, in any event, I am of opinion that the master and seaman can not, by contract, abrogate the provisions of section 4529. Without enlarging on the history of legislation of this character, it may be said that Congress has long regarded seamen in the nature of wards whose rights must be safeguarded. The requirement to pay them promptly is not to be

overridden. If, in the practical conduct of a responsible steamship company, such a provision is found inconvenient or otherwise unsatisfactory, the remedy is by appeal to the legislative body, but the courts must construe such a statute, not merely by its letter, but in sympathy with the legislative intent.

It is true that the statute does not in terms declare void an agreement in contravention thereof, but, in speaking of the termination of 'the agreement' it is clear that Congress had in mind that no matter what 'the agreement' was, the seaman's wages must be paid within two days after the man had duly performed the service required by 'the agreement'. Holding this view, I am of opinion that the statute is controlling and that the provision in the articles here discussed was void and of no effect. * * *

To hold that an owner or master may escape the penalty prescribed in the very statute which he seeks to avoid is to strip the statute of the precise purpose for which in that particular, it was enacted. However, debatable a question arising under a statute may be, it is no excuse that one has made an honest error in the interpretation of that statute."

The general interpretation of the statute in question is that the seamen are entitled to be compensated for delay in payment to them of the wages which they have honestly earned and where there is no reasonable ground for controversy with respect to their right to wages, they are entitled to two days' pay for each day that such sum due them is withheld. This is clearly indicated by District Judge Hanford, as stated in his opinion in the case of the *Amazon,* 144 Fed. 155.

The case of *Covert v. British Brig "Wexford"*, 3 Fed. 577, is a case in which the seamen libeled this vessel at the port of New York and is one in which there were various claims against the vessel. The vessel was sold under a decree of the court, and the proceeds, amounting to $2075., were paid into the registry of the court. Various parties appeared claiming liens on the vessel for materials and supplies. The amounts due them had not been adjusted but the fund in court was insufficient to pay in full the seamen, the master and these other parties, if their claims should be established. A mortgagee also appeared as claimant of the surplus proceeds of the vessel. The amount due the seamen for wages and extra pay was not contested, but it was objected, on behalf of the mortgagee and other parties who presented claims, that the seamen had no lien for their extra pay. Judge Choate in his opinion stated:

> "I think the extra pay due to the seamen is to be treated as wages for which they have a prior lien on the vessel. The statute provides that it shall be recoverable as wages. This clearly means by the same method or mode of procedure. The customary mode of recovering wages is by libeling the ship. The language therefore necessarily implies that the ship is holden for this extra pay, and aside from this particular language of the statute, I think that from the nature of the provision and the purpose it was intended to serve, the extra pay may be properly regarded as an addition or increase of wages in the event of the neglect of the master or owner to provide for their prompt payment. We have a similar provision

> in our own act. These statutes are designed for the protection of seamen to prevent the abuse of withholding their pay and thereby keeping them in port at expense and out of employment while waiting for a settlement. It is a liquidation of indemnity for such enforced expense and delay."

It is unreasonable to believe that any court would permit American seamen to be deprived of their just wages for a period of over one month and force them to obtain their own subsistence while the Pacific Motorship Company is settling a claim inferior in rank to that of libelants, and then permit them to say, "We will pay you so much money —you can leave it or take it.

Section 8316 of the United States Compiled Statutes (R. S., Sec. 4525), provides, among other things, that no right to wages shall be dependent on the earnings of freight by the vessel.

In *Pitman v. Hooper,* 11 Fed. 185, it was held:

> "Where freight is earned, it is not material that it has not been received by the master or owners."

In the same case it was held that seamen are entitled to wages for the full period of their employment in the ship's service for any particular voyage in which freight is or might be earned by the owner.

Mr. Moran, the port steward, on cross-examination testified as follows:

"Q. You did not know, then, what you were called down to the office of the Shipping Commissioner for, did you?

A. Only just what I have mentioned; he spoke about the payroll and provisions, but, as I say, he did not make any request of me.

Q. Was Captain Renny there at that time?

A. Yes, he was there.

Q. Did he say anything to you at that time?

A. He spoke about provisions; Mr. McArthur wanted me to O. K. the captain's signature to provide for the ship, and I told him I had no authority to do that. He wanted to know if I could procure provisions and I told him I did not have a dollar, nor did I know where I could get a dollar's credit, speaking for myself." * * *

"Q. Did you make any effort to provide provisions for the crew at that time?

A. No." * * *

"Q. Did you do anything at that time or subsequently thereto in reference to providing provisions for the crew?

A. No, because I was of the impression that they were discharged.

Q. What gave you that impression?

A. Mr. Ringwood.

Q. What did Mr. Ringwood say to you?"

* * * *

A. Mr. Ringwood told me not to provide any fore for them; that by the time the provisions that were sent there were consumed the crew would be discharged" (apostles pp. 180, 184).

It is very apparent from the record that Mr. Ringwood, the president of the Pacific Motorship Company, attempted in every manner possible to

clear himself from any responsibility in reference to providing provisions and wages for the crew, even keeping out of the way in order to do so, and refusing to communicate with the Shipping Commissioner.

On cross examination, Mr. Baird, the auditor of the Pacific Motorship Company, testified as follows:

> "Q. Did you have any conversation with Mr. McArthur on that day over the telephone?
> A. No, only after somebody else called me to the 'phone, I spoke in the presence of another party.
> Q. Who was asked for then?
> A. Mr. Ringwood, I believe it was.
> Q. Mr. Ringwood was asked for?
> A. I believe he was.
> Q. What did you say?
> A. I spoke to Mr. Ringwood, and he referred me to Mr. Moran, I believe it was."
> * * * *
>
> "Q. What did you say to Mr. Ringwood?
> A. I just said Mr. McArthur wished to speak to him.
> Q. What did Mr. Ringwood say?
> A. He referred me to Mr. Moran; he wanted Mr. Moran to take the matter up; he had nothing to speak to Mr. McArthur about" apostles pp. 193, 194).

We feel that it is necessary to again refer to the claim of appellants' counsel that libelants demanded more than the court found they were entitled to, because of the continued reiteration of this unjustifiable contention. As we have already said, the

schedule attached to the libel included the amount required for transportation and subsistence. This was necessary for the reason that had the vessel been abandoned by the owners and the other lien claimants allowed to participate, it would have been necessary for the libelants to obtain a decree for an amount covering their wages, together with the amount necessary for transportation, subsistence during transportation and any additional amounts that they were entitled to receive under the shipping articles. Notwithstanding these facts, the appellants claim that the seamen persisted in making excessive claims until after the court had decided definitely that they were groundless. The record does not support appellants' statement. The court in fact found that the seamen were entitled to their wages up to March 17th together with a sum equal to two days for one from the 17th day of March, 1921 to May 17, 1921, and transportation and subsistence en route. As a matter of fact, the statement from which the appellants computed the amount of $5609.20, which was tendered on April 27th by Mr. Gerber was obtained from the payroll furnished by the master to the owners covering also the account of credits for certain advances, and stores drawn by the seamen from the slop chest. This accounts for the apparent discrepancy between $5609.20 and $5551.07.

We submit, that at no time did the appellants make a tender such as was contemplated under the statutes. If there was a controversy as to the

amount of wages due as claimed by appellants, why was the Navy Department authorized by them to pay to the credit of Ira S. Lillick as trustee the amount equal at least to the claim which the libelants made on March 17th, 1921. Had the owner of the motorship "Benowa" made a valid assignment of the freight money or a portion thereof due for the particular voyage in question, to the libelants in this case, would they not have obtained a release from all claims which the libelants may have had against them for wages? As a matter of fact, the libelants were not informed by the Pacific Motorship Company that this freight money was in the hands of the Navy Department, but it was only by mere chance that the facts were ascertained by proctor for libelants. Even after this freight money was released, as appears from appellant's statement, it was paid to Houlder, Weir & Boyd, Inc., not as agents of the Pacific Motorship Company, but as principal upon the contract with the Navy Department.

W. L. Comyn in his testimony claims that he made an assignment of a portion of freight moneys to proctor for libelants and therefore it was not necessary to do anything further on behalf of the crew. It is clearly apparent from the record that Houlder, Weir & Boyd were the principals on the contract of affreightment with the Navy Department and the only ones that the Navy Department would recognize (apostles pp. 457, 458, 459). Therefore the attempted stop order sent to the Navy De-

partment by proctor for libelants and the so-called assignment testified to by Mr. W. L. Comyn was not recognized because as far as the contract was concerned the only firm having any interest therein was Houlder, Weir & Boyd.

On page 41 of appellants' brief they state: "The only reason why libelants did not receive the assigned moneys was that they failed to make the necessary demand for them". In the same breath appellants contend that the Pacific Motorship Company made an assignment (which we deny) of a portion of the freight monies due from the Navy Department. If they had made a good assignment and the money had been released, it was not necessary to make further demand upon the agents of the Pacific Motorship Company, yet they would have this court believe that they did everything in their power to see that the wages of the seamen were promptly paid. Our indignation at the manner in which appellants have discussed the facts as to this assignment is so great, that we refrain from characterizing the motives which must have actuated counsel in expressing themselves as they have. We leave the record as to this matter without further comment. The court is in as good a position as we are to picture the real situation. We submit that the record shows that nothing was done by the Pacific Motorship Company other than to serve its own interests and that a more exaggerated case of abandoning seamen in a foreign port

without subsistence and nonpayment of wages cannot be found in the record of maritime cases.

Counsel claim that libelants should have stated facts in their libel showing that the refusal of payment was without sufficient cause, but no authority is cited upholding this contention. This is a matter of defense, if such can be shown and if the facts for non-payment show that it was without sufficient cause then the court will find accordingly.

On page 44 of counsel's brief they state that the equitable owner, the Pacific Motorship Company, is not a party. However, a verified claim was filed in this case, as appears from the record (apostles p. 46).

Counsel again cited the case of the *General McPherson,* 100 Fed. 860, and state that the court in that case intimated that no penalty could be recovered in a proceeding *in rem.* The court distinctly refused to pass upon that question, but as the point has already been referred to by us we will not discuss it further.

So much stress has been laid upon the point that the other creditors of the vessel would have to bear the burden of the claims of the seamen that we must call attention to the fact that this statute was expressly made for the benefit of the seamen; undoubtedly, because seamen when signing shipping articles have not the means of protecting themselves from being deprived of their wages and stranded in foreign ports, while other creditors of

a vessel or of the owners thereof can secure collateral or other security in case they are in doubt as to the financial ability of the owner to pay its bills. The seamen are wards of the court and look to the court and to the law for their protection. They have not the means of investigating the financial standing of the owners of a vessel, such as mercantile houses have with their credit departments, and various other means of keeping in touch with the financial standing of operators of vessels. As expressed in the case of the *City of Montgomery*, 210 Fed. at pages 675 and 676, in commenting upon this statute:

> "If in the practical conduct of a responsible steamship company such a provision is found inconvenient, or otherwise unsatisfactory, the remedy is by appeal to the legislative body, but the court must construe such a statute not merely by its letter but in sympathy with the legislative intent."

Counsel criticise the decree because it provides that if the transportation and subsistence are not furnished to libelants upon satisfaction of "the foregoing provisions of this decree," that in lieu thereof each of said libelants shall receive the amounts set opposite their respective names. The decree was proper because many of the libelants had homes on the East coast and desired to return to their homes and were forced to borrow money or secure it by other means and thereafter advance the cost of transportation and subsistence en route which they were entitled to receive under

the shipping articles. We submit that it was proper for the court to allow this sum, in view of the fact that the court could not compel them to furnish transportation and subsistence but could decree a certain amount to the libelants in lieu thereof upon their failure to furnish such transportation or subsistence and, also if the libelants were forced to advance their cost of transportation and subsistence prior to the termination of this case, they are entitled to reimbursement.

Another question raised by appellants is that a decree for the sale of the vessel under a junior libel without consolidating it with earlier libels and intervening libels under which the vessel is held by the marshal is irregular. No authority, however, is cited to support this contention. In *Hughes on Admiralty,* 2nd Ed. at page 397, the author states:

> "In many Districts independent libels are filed against the vessel. In some the vessel is arrested under the first libel and the others come in by petition. In some Districts after a certain time all the claims are referred to a commissioner to ascertain and report their relative rank. In others, in the event of no contest, a decree is entered at the return date or as soon thereafter as possible, giving petitioners a judgment against the vessel and directing a sale. It is impossible to lay down any rule on the subject."

We submit that it has been the practice in this District to file independent libels and in fact this contention is supported by Admiralty Rule 25 of this District:

> "Where the res remains in the custody of the marshal the cause will not be heard until after publication of process shall have been made in the cause, or in some other pending cause in which also the property is held in custody, but no final decree shall be entered ordering the condemnation or sale of property not perishable arrested under the process in rem unless publication of process in that cause shall have been duly made." * * *

Rule 40 of the Admiralty rules of the Supreme Court of the United States is as follows:

> "All sales of property under any decree of Admiralty shall be made by a marshal or his deputy, or through proper officer assigned by the court, where the marshal is a party in interest in pursuance of the order of the court and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale to be disposed of by the court according to law."

This claim of appellants is dispensed with by reason of a bond having been filed as hereinbefore mentioned. This contention was made in the court below and, on the 16th day of May, 1921, upon the suggestion of Thatcher & Wright, the matter was reassigned for argument on the 17th of May, at which time Judge Neterer requested that counsel for libelants notify all other libelants that this matter would be argued at that time. The court then requested proctor for libelants to notify the other claimants of the hearing, which was done and the only attorneys appearing outside of the attorneys of record in this case were Thatcher &

Wright representing various lien claimants and the court found that the contentions which libelants are here making were unsound and that it is the practice in this District to either commence independent libels or intervene in the original libel.

Counsel claim that we have delayed this case, and yet in all cases commenced for other lien claimants in which the docket appears in the record, not one of the cases is at issue, nor has an answer been filed therein. The main reason for commencing an independent libel was to assure a speedy determination in this case and not be delayed by reason of other claims in which there was no dire necessity for a speedy determination.

In conclusion, we desire to state that the record clearly upholds the contention of libelants that proper demand was made by them for wages in compliance with sections 4529 and 4530 of the Revised Statutes.

The vessel arrived at the port of San Francisco on February 28th, 1921, and, upon its arrival, demand was made by the crew upon the master for one-half of the wages due them, and this was refused by reason of the fact that the master had no funds belonging to the company. Thereupon he notified the office of the company of the demand, and thereafter, continual demands were made by the crew upon the master while this vessel was in port, both previous to the time that arrangements were made for the discharge of the cargo at California City and subsequent thereto (apostles 119, 120, 168, 169).

We submit that the findings of fact expressed in the opinion of the Judge in the lower court under the facts and law appertaining to this case are correct and that the decree entered therein should be affirmed.

Dated, San Francisco,
October 19, 1921.

Respectfully submitted,

IRA S. LILLICK,
Proctor for Appellees.

J. ARTHUR OLSON,
Of Counsel.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 3

W. E. GERBER, JR., and ANGLO-CALIFORNIA TRUST COMPANY (a corporation),

Appellants,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Appellees.

No. 3749

SUPPLEMENTAL BRIEF FOR APPELLANTS.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellants.

OSCAR SUTRO,
FELIX T. SMITH,
Of Counsel.

Topical Index

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SUPPLEMENTAL BRIEF FOR APPELLANTS.

Pursuant to the permission granted at the oral argument of this cause, appellants file this their supplemental brief in reply to the points made in appellees' brief and oral argument.

A. Appellees' Brief in General.

Throughout appellees' brief are accusations that we have misstated or misrepresented the facts of the case. Thus (Appellees' Brief, p. 2) it is said that we omitted to state the facts in regard to the "Benowa" putting into San Francisco in distress and later arranging to discharge its cargo here. There was no such omission (Appellants' Brief, p. 3). It will appear that other facts whose omission is charged either were stated by us or else are entirely immaterial. The court will also note that, in the numerous instances in which it is charged we misstated the facts, our brief contains specific citations of the record in support of our statements; the passages cited speak for themselves.

It is also charged repeatedly that our arguments are not supported by citations of authorities. It is sufficient to say that in each of the instances in question our arguments are supported, not merely by citations, but by actual quotations from cases supporting our positions.

The attempt is made throughout appellees' brief to draw a pitiful picture of the straits in which libelants were left by their inability to collect their wages promptly.

Thus it is said that seamen are "wards of the court" (Appellees' Brief, p. 36). As pointed out at the oral argument, the "Benowa" is not an old-fashioned sailing vessel, but is a modern motorship, and her crew are a very different class of men from the ignorant seamen courts of admiralty have been accustomed to deal-

ing with. The shipping articles show (Apostles, pp. 443 to 445) libelants are all young men (only two of them being over thirty years of age), drawing good salaries (since practically half of the penalty awarded is payable to men earning monthly salaries of from $170. to over $300.). Such men are fully capable of protecting their rights.

> "Seamen are wards of the courts, no doubt, and are protected against their own carelessness. * * * Still they remain in some measure persons *sui juris*, and there is neither justice nor policy in aiding them to catch at penalties, where they have suffered no wrongs. The libelants were not helpless or ignorant victims, but alive to their rights."
>
> *Petterson v. United States,* 274 Fed. 1000, 1003.

Much is made of "their dire needs" (Appellees' Brief, p. 5), and it is said they were "in a city where they were unknown" (Appellees' Brief, p. 8), and that they were "left stranded without any means of support" (Appellees' Brief, p. 17). There is nothing in the record to support these statements. The only showing in the record as to the homes of these men is the statement of their birth places in the shipping articles, which show (Apostles, p. 443) that at least one of them is a native Californian. It may not be improper to depart from the record to such an extent as to say that we have seen several of these men in this city long after they had been paid off and received transportation East, and that our information is that others of them reside here.

The charge is also made (Appellees' Brief, p. 18) that the libelants were "ignored, worse than ignored".

The record shows nothing whatever as to any direct dealings between the libelants and the Pacific Motorship Company or the receiver. The passages relied upon in appellees' brief as authority for this charge show merely that Captain Renny, the master, not one of the libelants in this case, claims to have been treated discourteously by Mr. Ringwood, the president of Pacific Motorship Company. The record also shows, however, that Captain Renny was having trouble with Pacific Motorship Company over his claims (Apostles pp. 120 to 122), and it is reasonably to be inferred that the discourteous treatment of which Captain Renny complains was in relation to his own claim and not that of the crew. In fact, all of the representatives of Pacific Motorship Company with whom he testifies to having talked state positively that he never discussed the matter of the crew's wages with them (Apostles, pp. 172, 175, 192).

B. Appellants' Argument.

Appellants' brief stated ten main points, logically grouped, each one of which if sustained required either the modification or the absolute reversal of the decree. Appellees' brief is not subdivided and is not provided with an index. To the best of our ability we have segregated those portions of the brief which relates to the various points made in our brief and treat them hereinafter in that order.

FIRST. THE PENALTY.

I. Under no circumstances can any penalty be imposed for any period subsequent to April 27, 1921, the date of the tender to libelants under which more was deposited in the Registry than was subsequently awarded to libelants as wages.

(Appellants' Brief, pp. 17 to 20; Appellees' Brief, pp. 7 to 10, 32.)

It is said (Appellees' Brief, p. 8) that if the crew had accepted the tender "they would have been without any remedy for the time they had lost from March 17th to April 27th, which is a period of forty days." It would seem sufficient to point out that in the case of *Vincent v. United States,* 272 Fed. 889, recently decided by this court and cited on this very page of appellants' brief, under circumstances in this respect similar to the case at bar, notwithstanding the acceptance of such a tender the crew was allowed the penalty from the date when the court held the wages should have been paid to the date of the tender. In this respect the case is even stronger than that at bar, because the tender included payment of full wages up to the date of the tender, and it might well have been argued that the receipt of the full wages up to the date of the tender was a waiver of any penalty for the intervening period.

In the present case the tender was not offered in full satisfaction of the claim of libelants, but was unconditional (Apostles, pp. 44 to 46; 225; 243; 245 to 246). If by the statement to the contrary made in their brief and oral argument, appellees mean that the tender was accompanied by conditions to this effect which are not embodied in the record, we beg respectfully to assure

the court that such is not the fact. If we are to depart from the record to reply to this matter *dehors* the record, we say that we explained this matter definitely to libelants' proctor over the telephone at the time the tender was made and at a time when libelants' proctor advised us that libelant W. S. Austin, representing the rest of the libelants, was in his office.

It is also said (Appellees' Brief, p. 8) that we have cited no authority to substantiate this point. This court will note that we have not only cited, but quoted from the decision of the Supreme Court of the United States in *Pacific Mail Steamship Co. v. Schmidt,* 241 U. S. 245, 250 (Appellants' Brief, p. 19). The effect of this decision is, not merely that a shipowner has the right to contest his liability for the penalty and to delay the payment of the penalty while this contest is pending, without incurring additional penalties, but even that pending such contest in regard to the penalty he may delay payment of the wages themselves. We respectfully submit that this decision is controlling, so far as this point is concerned.

We pointed out (Appellants' Brief, pp. 19 to 20) that on May 17th libelants' proctor had agreed that the penalty should cease to run from that date on, and that in explanation of this agreement libelants' proctor had recognized that since we were willing that the money so tendered and deposited in court might be disbursed to the seamen, it was proper that the penalty should cease to run. And we said that if on May 17th it was proper that the penalty ceased to run, because we were willing that

the tendered fund be paid to libelants, it necessarily followed that it was proper that the penalty cease to run on April 27th, when the tender was originally made to libelants. Without disputing the force of our reasoning in this regard, appellees simply deny that any such agreement was made (Appellees' Brief, p. 7). Our statements in this regard, however, are not merely *ex parte* statements not based on the record, but are founded upon the letter of libelants' proctor confirming this agreement, which is set forth in full in the record (Apostles, pp. 239 to 242), and is precisely as quoted by us (Appellants' Brief, pp. 19 to 20).

In this regard it is also said that "counsel could not stipulate away any rights which the appellees herein might have under the decree" (Appellees' Brief, p. 7). It is sufficient to point out that the agreement was made May 17th, at which time there was no decree in existence, the interlocutory decree not having been entered until May 25, 1921 (Apostles, p. 233 to 234), and that this decree expressly recognizes the agreement in question by providing that the penalty shall run "for each and every day from and after the 17th day of March, 1921 until the 17th day of May, 1921" (Apostles, p. 232), and by providing that it be entered *nunc pro-tunc* as of May 17, 1921 (Apostles, p. 233). So far as concerns counsel's suggestion that the stipulation made by them was beyond his powers, we simply call attention to the fact that no such suggestion was made in his letter of May 19, 1921, confirming the agreement (Apostles, pp. 239 to 242). Obviously the stipulation was within the powers of counsel in a pending case.

It is said (Appellees' Brief, p. 8) that in *Vincent v. United States,* 272 Fed. 889, this court "disposed of this question." The penalty awarded in that case covered merely the period from the date the wages became due to the date of the tender and payment of the wages; no penalty was awarded for the period between the tender of the wages and the decree for the penalty. So far as it goes, therefore, the decision is an authority in our favor on this point.

A similar ruling was recently made by Judge Hand, saying:

> "Even so, their recovery would only be of four days' pay; i. e., from June 8th, four days after the discharge, until June 12th, when they were offered pay by the master."
>
> *Petterson v. United States,* 274 Fed. 1000, 1002.

II. No penalty should be imposed for any period subsequent to March 26, 1921, the date of the appointment of the receiver.

(Appellants' Brief, p. 20; Appellees' Brief, pp. 11 to 13, 19 to 21, 22 to 23.)

Appellees quote at length (Appellees' Brief, p. 12) an answer given by the receiver upon his cross-examination. The same quotation was made in the decision of the District Court (Apostles, p. 224), and was discussed in our brief (Appellants' Brief, pp. 22 to 25). As there pointed out, this answer was given on cross-examination, but was immediately explained upon redirect examination. The various steps taken by the receiver in regard to the "Benowa" are outlined in our

brief and are fully set forth in the portions of the record there cited.

It is also said (Appellees' Brief, p. 12) that the appointment of the receiver did not prevent application being made to the court to relieve the situation of the libelants. As pointed out (Appellants' Brief, p. 25) the receiver did make such application. It also appears that libelants received actual communications from the receiver (Apostles, pp. 452 to 453), that their proctor knew of the pendency of the receivership proceedings (Apostles, p. 201) and actually took part in them (Apostles, p. 302). It has not been suggested that any person was more fitted than libelants' own proctor either to make the application to the court for the relief of libelants' situation or to expedite the hearing of the application made by the receiver, nor has it been suggested that any obstacles were placed in the way of his doing so.

Finally an elaborate demonstration is made (Appellees' Brief, pp. 19 to 21) to the effect that the appointment of the receiver could not divest the admiralty court of the jurisdiction it had already acquired in this proceeding. No one has ever claimed the appointment of the receiver did divest the court of jurisdiction. Our point simply is that in exercising its jurisdiction the court sitting in admiralty cannot close its eyes and ears to its own proceedings in equity when they are properly brought to its attention, and that, so far as concerns the imposition of any penalty subsequent to the appointment of the receiver, the court on

its admiralty side should not penalize the parties for the alleged neglect of its own officer appointed on the equity side.

III. No penalty at all should be imposed.

(a) There was sufficient cause for the delay in the payment of the wages.

(1) *The financial condition of Pacific Motorship Company made the payment impossible.*

(Appellants' Brief, p. 30; Appellees' Brief, pp. 4, 13 to 14, 17 to 19, 23 to 26.)

Appellees dispute our statement (Appellants' Brief, pp. 31 to 32) that Section 4529 of the Revised Statutes is penal in its nature. Their argument is that this is not a penalty, but "liquidated damages for enforced idleness" (Appellees' Brief, pp. 17, 28). If these men had been working they would have earned only one day's pay for each day during the period of "enforced idleness"; this statute gives them two days' pay for each day, in addition to what they may earn by whatever other employment they may find. Clearly such a statute cannot be intended as liquidated damages. The only authority upon which appellees rely is *Covert v. British Brig Wexford,* 3 Fed. 577 (Appellees' Brief, p. 28). The British statute there enforced was fundamentally different from the present R. S. 4529 and resembles some of the predecessors of the latter section, in that the penalty was limited so that it could not run more than ten days. Certainly we cannot quarrel with the Judge for holding that penalty was liquidated dam-

ages. In the present case, however, libelants claim the penalty for more than two months and the amount is more than twice the total amount of the wages due. Clearly it is a penalty and nothing else. In addition to the authorities cited in our opening brief, holding that it is a penalty, we may call attention to the fact that in *Vincent v. United States,* 272 Fed. 889 (Appellees' Brief, p. 8), as well as in *Pacific Mail Steamship Co. v. Schmidt,* 214 Fed. 513, 520, this court so denominated it. We may also call attention to the recent statement of Judge Learned Hand that

> "the statute is penal and the right *stricti juris*".
> *Petterson v. United States,* 274 Fed. 1000, 1001.

The suggestion is repeatedly made (Appellees' Brief, pp. 4, 25) that Pacific Motorship Company might in some way have hypothecated the vessel so as to raise the funds necessary to pay libelants' claims. No specific suggestion is made, however, as to what steps Pacific Motorship Company should have taken or as to just who would have accepted such an hypothecation as security for a loan. The record shows clearly, however, that the "Benowa" was already hypothecated under a mortgage for $344,000 (Apostles, pp. 309 to 310) and an equitable mortgage for $1,625,000; that she was in the possession of the marshal under a libel *in rem* based on a maritime lien (Apostles, pp. 271 to 276), and that it was known that Pacific Motorship Company was hopelessly insolvent and had no credit at all (Apostles, pp. 196; 200; 204 to 206). It is obvious

that no responsible bank or other institution would have lent money under these circumstances.

It is also intimated (Appellees' Brief, pp. 13 to 14) that Pacific Motorship Company should have "taken the necessary preliminary steps to insure the government's withholding such an amount as might have been required to pay the wages to become due out of the freight moneys" (Appellees' Brief, p. 14). Libelants' proctor, Mr. Lillick, however, had full knowledge of the facts in connection with these freight moneys (Apostles, pp. 477 to 478) and in assigning sufficient of these moneys to their proctor to pay libelants' claims and in endeavoring to insure that he would receive it, Mr. Comyn, the general agent of Pacific Motorship Company, testified that he put the transaction "in the form that Mr. Lillick requested" (Apostles, p. 205). Libelants' proctor was a lawyer and familiar with the steps necessary to be taken; Mr. Comyn was not. It is submitted that libelants cannot now complain that the steps then taken were not sufficient.

It is also said (Appellees' Brief, p. 14) that Pacific Motorship Company must have known of its financial condition for some time prior to the arrival of the "Benowa" at San Francisco. The inference apparently is that appellees intend to argue that, foreseeing its financial condition, the Company should have provided funds in advance to meet the wages due libelants at San Francisco. But as pointed out (Appellants' Brief, p. 3; Appellees' Brief, p. 2) it was not expected that the "Benowa" would put into San Francisco.

She arrived here as in a port of distress, and even then it was expected that her voyage would be continued to Bremerton. Even if Pacific Motorship Company could have foreseen its own financial failure, it certainly could not have foreseen the particular events which occurred in regard to this crew.

Appellees ascribe to us the argument "that the burden of the responsibility for nonpayment of these wages should fall upon the seamen rather than the owner of the vessel" (Appellees' Brief, p. 13). Such has never been our position. As already pointed out (Appellants' Brief, pp. 34 to 35) the District Judge was absolutely right in his statement that "wages are a first and prior charge against the vessel" (Apostles, p. 227). Responsibility for the nonpayment of wages cannot be shifted, and it is not our position that it should be shifted. Our position simply is that, where payment of the wages is necessarily delayed without the fault of any person whatsoever, the crew is not to be enriched by the imposition of an undeserved penalty to the detriment of those having claims upon the vessel.

Appellees' final argument is (Appellees' Brief, p. 23) that it must be inferred that funds could have been raised to pay off the crew because Mr. Gerber arranged to purchase the claim of the Australian Government, amounting to $1,625,000, and then immediately advanced $5,609.20 to pay the wages of libelants. This is merely one element in the attempt made throughout appellees' brief, to which we shall later refer, to confuse Mr. Ger-

ber, the purchaser of the claim of the Australian Government, with Pacific Motorship Company, the equitable owner of the "Benowa". It is obvious, however, that the funds at Mr. Gerber's disposal and used by him in the purchase of the claim of the Australian Government could in no way have been at the disposal of Pacific Motorship Company, in which he had theretofore had no interest (Apostles, p. 209). Obviously, unless he had funds with which to meet the prior maritime liens on these vessels, Mr. Gerber would not have ventured anything in the purchase of the claim of the Australian Government. Nor, on the other hand, unless he was satisfied that he could purchase the Australian Government's claim, would he have been willing to advance sums to pay off the maritime liens. As we have already pointed out (Appellants' Brief, pp. 5 to 6), Mr. Gerber made his tender to libelants as soon as he had definite assurance that his negotiations with the Australian Government would terminate satisfactorily, and in fact before these negotiations were actually closed. The money tendered by Mr. Gerber, therefore, was not and could not be made available at any time before the date of the tender.

2. *The dispute as to the amount of wages due justified refusal to pay until this could be adjusted.*

(Appellants' Brief, p. 37; Appellees' Brief, pp. 10 to 11; 31 to 32; 32 to 33.)

In reply to our point that the original sum demanded by libelants as wages up to *March 15th* is $10,395.83, while the amount awarded by the court as wages up

to *March 17th* was $5,551.07, appellees state (Appellees' Brief, pp. 10 to 11; 31 to 33) that the sum stated in the libel includes not only wages but transportation money and subsistence during transportation. Certainly no such construction can properly be put upon the language used by libelants at the time. The schedule attached to the libel (Apostles, p. 18) has a column which totals $10,395.83, and which is headed "wages due". It cannot be inferred that this schedule intends to include under the heading "wages" anything but wages. Moreover, article II of the libel (Apostles, p. 14) contains the allegation that libelants "should receive *wages* in accordance with the schedule attached hereto". Separate allegations are made in regard to transportation and subsistence (Article VII; Apostles, p. 15). So also the telegram of libelants' proctor to the Navy Department, dated March 16, 1921, says "crew's *wages* unpaid" and states "the amount due crew, viz. ten thousand three hundred ninety-five dollars eighty three cents" (Apostles, p. 479). His letter of the same date to Admiral Halstead (Apostles, pp. 477 to 478) says that the owners of the "Benowa" "have not paid the *wages* due the members of her crew and there is today due the said crew $10,395.83". It is submitted that in all these documents the word "wages" must mean wages and cannot include other demands made by the crew.

Despite this language in all their documents, appellees insist that the amounts stated in the schedule do include transportation and subsistence and assert, as they say, "without fear of contradiction" that so con-

strued the demand set forth in the libel is the same as the amount ultimately awarded them. This assertion, however, is one which cannot rashly be made without fear of contradiction. The libel properly should have included wages only up to March 15th, and it is obvious that the wages up to that date must be less than the wages due as stated in the interlocutory decree, which carries wages up to March 17th. The amount due each of the libelants, except Crawford and Hughes (who received their transportation in kind, but as to whom the figure $175.66 may properly be interpolated) for transportation and subsistence are stated in the final decree. If libelants' assertion is correct, therefore, it should follow that the amount stated in the libel in each case should be slightly less (to allow for the two days' wages, between March 15th and March 17th) than the sum of the amounts stated in the interlocutory decree and the final decree. We are, therefore, able to make up the following:

Contradiction.

See Appellees' Brief, pages 10 to 11; also pages 31 to 32.

Source of figures.	Interlocutory decree. (Apostles pp. 232-233.)	Final decree (Apostles pp. 253-254.)	1+2	Libel (Apostles p. 18.)	4—3
Character of charge.	**Wages to Mar. 17.**	**Transportation and Subsistence.**	**Total due.**	**"Wages due."**	**Excess.**
Richard J. Spencer	$404.85	$175.66	$580.51	$623.85	$ 43.34
Christian V. Miller	355.20	175.66	530.88	568.10	37.24
Robert H. Councill	308.90	175.66	484.56	525.08	40.52
Tim Harrigan	159.30	168.77	328.07	352.39	24.32
Franklin Adrean, Jr.	129.35	168.77	298.12	333.04	34.92
Frank Garlock	155.85	168.77	324.62	333.04	8.42
Birger Johansson	152.80	168.77	321.57	333.04	11.47
Fritz Schilling	139.90	168.77	308.67	333.04	24.37
John Lahtimen	146.65	168.77	315.42	333.04	17.62
Wm. H. Crawford	517.30	*175.66	692.96	817.80	124.84
John Burton Hughes	303.15	*175.66	478.81	523.85	45.04
Walter S. Austin	347.45	175.66	523.11	568.35	45.24
Leon A. Carter	300.60	175.66	476.26	528.08	51.82
Campbell A. Hobson	169.97	168.77	338.74	354.73	15.99
W. Owens	174.15	168.77	342.92	354.73	11.81
W. C. Ward	166.99	168.77	335.76	354.73	18.97
N. E. Austin	167.03	175.66	342.69	430.38	87.69
Charles V. Smith	123.79	168.77	292.56	320.00	27.44
H. D. Wright	245.03	175.66	420.69	306.22	
Robert Doiyle	203.70	168.77	372.47	400.15	27.68
John Lopez	158.31	168.77	327.08	362.05	34.97
William Ovid	114.35	168.77	283.12	295.38	12.26
S. J. Ryan	123.33	168.77	292.10	307.03	14.93
C. Garfield	114.35	168.77	283.12	295.38	12.26
D. W. Davis	229.15	175.66	404.81	442.35	37.54

*Interpolated.

The only conclusion to be drawn is that the amounts originally claimed by libelants as wages had no relation whatever to the matter of transportation and subsistence money.

When this contradiction was pointed out at the oral argument, appellees, after considering the matter over the noon hour, came into court and read article VII of the libel (Apostles, p. 15). No other reply to the contradiction was offered. We submit that article VII of the libel assists the appellees in no way. All that can be gathered from this article is that while the court awarded to libelants as transportation and subsistence money the sums of $175.66 and $166.77 each, depending upon their grade, libelants on March 15th were demanding $209.82 each. That is, not only were their demands for wages excessive, but also their demands for transportation and subsistence.

It is said that we cannot "point to any part of the record where any question was made" as to the amount of wages due. In our earlier brief and herein we have referred to the demands originally made by the libelants. These were put in issue by article I of the receiver's answer (Apostles, p. 22) and by article II of the answer of the Commonwealth of Australia (Apostles, p. 27). In addition to these matters, it may also be pointed out that libelants were claiming wages, not merely to the time of their discharge, but to the time of their arrival home, during the period of their transportation there. This is brought out in the questions asked by proctor for libelants on the examination of Mr. Walter McArthur, Shipping Commissioner for this port (Apostles,

pp. 87 to 88). In accordance with Mr. McArthur's testimony, this point also was ruled against the libelants.

Their final answer to our argument on this point is in the form of a question (Appellees' Brief, pp. 32 to 33), as to why $12,000 was assigned to Mr. Lillick if there was controversy as to the amount of the wages due. The obvious answer to this question is that Mr. Lillick was financially responsible and would be liable for any misapplication of the fund assigned in case he paid the libelants more than was actually due them. On the oral argument, moreover, counsel for appellees stated more facts outside the record, hitherto unknown to us, and which we have not thought it worth while to verify, which seem to constitute a further answer to this question. Mr. Olson stated at the argument that it was understood that this fund when received was to be deposited by Mr. Lillick to his credit as trustee in one of the banks in San Francisco, and was to be disbursed by him in payment of the amounts due the members of the crew as they should be ascertained.

Throughout the brief counsel has insisted that we have misconstrued the record, on this point particularly. The portions of the record to which we call the court's attention speak for themselves and demonstrate that the language used by appellees is not only improper, but wholly unjustified.

3. *The acceptance by libelants of the assignment of freight money made it unnecessary for Pacific Motorship Company to pay libelants from some other source.*

(Appellants' Brief, p. 39; Appellees' Brief, pp. 4 to 6; 33 to 34.)

Appellees deny that any assignment was made (Appellees' Brief, p. 6). This denial is surprising, in the face of the record as cited by us (Appellants' Brief, pp. 4 to 5; 39). Apparently it is appellees' position that Mr. Comyn's testimony, that he made the assignment, is to be disregarded, or regarded as a mere conclusion and not a statement of fact, and that the telegrams referred to taken together do not constitute a sufficient assignment in law. We submit that upon reading the telegrams (Apostles, pp. 476 to 477) the court will conclude that they did constitute a sufficient assignment. It is quite clear, however, that it does not lie in the mouth of counsel for appellees, who drafted these instruments, to attack their legal sufficiency. Mr. Comyn's testimony is:

> "We assigned the freight on the 'Benowa' to Mr. Lillick for the payment of the crew's wages.
>
> Q. In what form did you make that assignment?
>
> A. The assignment was in the form that Mr. Lillick requested." (Apostles, pp. 204 to 205.)

Appellees' final question on this assignment might be answered in the affirmative. They ask, "Had the owner of the motorship 'Benowa' made a valid assignment of the freight money or a portion thereof due for the particular voyage in question, to the libelants in this case, would they not have obtained a release from all claims which the libelants may have had against them for wages?" (Appellees' Brief, p. 33.) As we have pointed out (Appellants' Brief, p. 41), while such an assignment ordinarily does not operate as a release and discharge of the indebtedness, nevertheless, if, as here, the assignee

suffers the assigned claim to be lost this operates as a release and discharge.

But even if such effect is not to be given to the assignment in the present instance, it is quite clear that the assignment having been made and accepted no penalty should be imposed because further steps were not taken to obtain funds for the payment of libelants.

(b) There is no allegation that the delay in payment was without sufficient cause.

(Appellants' Brief, p. 42; Appellees' Brief, p. 35.)

Appellees' only answer to our point is that no authority is cited holding such allegation necessary. In referring to our brief the court will find that we did cite *The Express,* 129 Fed. 655, 656, which decides the precise point which is here raised.

(c) The effect of the decree is to penalize, not the owners of the vessel, but those having liens upon her.

(Appellants' Brief, p. 44; Appellees' Brief, pp. 13, 22, 24, 35 to 36.)

On the day our brief went to press, the District Court rendered an opinion in another case, a copy of which we filed at the oral argument. In this decision, which covers the precise point now raised by us, Judge Dooling said:

> "The statute awarding penalties provides that:
>
> > 'Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seamen a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court.' (R. S. 4529.)

> In the present case neither the master nor the owner has any interest in the fund now in the registry of the court resulting from the sale of the vessel. To allow the penalties would be to transfer the burden thereof from the master and the owner to the lien-holders and the mortgagee. This I do not believe was ever contemplated, or intended by Congress in enacting the statute in question."

We submit that the reasoning of Judge Dooling is correct and that on the authority of this case and the *General McPherson,* 100 Fed. 860, 864 (Appellants' Brief, p. 44), the decree in the case at bar should be reversed.

Appellees make the point that the mortgage to the Australian Government was not a preferred mortgage under the Jones Act (Appellees' Brief, p. 22); but neither was the mortgage of the Shipping Board which was involved in the recent decision of Judge Dooling. There is obviously nothing in the point, for, while admiralty will not take jurisdiction to foreclose a common law mortgage, it is well settled that when admiralty has jurisdiction, as for instance in a suit on a maritime lien, it will exercise that jurisdiction with regard to the property rights of all parties, whether or not they may have maritime liens, and specifically that it will enforce the rights of a common law mortgagee.

The Gordon Campbell, 131 Fed. 963;
Topfer v. The Mary Zephyr, 2 Fed. 824.

As we have said, appellees persist in an attempt to identify Mr. Gerber, the appellant herein, with Pacific Motorship Company, the former equitable owner of the "Benowa". Thus appellees insist (Appellees' Brief, p.

35) that Pacific Motorship Company filed the claim herein. The record shows (Apostles, pp. 46 to 47) that the claim was filed, not by Pacific Motorship Company, but by the receiver. This also appears from the receiver's answer (Apostles, pp. 24 to 25). It is also said (Appellees' Brief, p. 24) that we, who appear in this case on behalf of Mr. Gerber, "apparently represented Mr. Comyn". This statement is, if course, entirely outside the record. The fact, however, that in other matters we have represented Mr. Comyn does not disqualify us from acting for Mr. Gerber in the present case. Mr. Comyn was not the Pacific Motorship Company and had no interest in the Company, except as a creditor in the sum of about $85,000 (Apostles, p. 211). He had been its general agent (Apostles, p. 199), and it was only natural that Mr. Gerber on acquiring the predominating interest in these vessels should have obtained Mr. Comyn's assistance and should have employed us, who have acted for Mr. Comyn in other capacities. Reference is made (Appellees' Brief, p. 13) to the supersedeas bond filed herein, which, at the oral argument, appellees stated had been filed by the claimant. The bond appears in the record (Apostles, pp. 422 to 424). It was given by Mr. Gerber, the substituted intervening libelant. Anglo-California Trust Company, the substituted claimant, gave merely a cost bond (Apostles, pp. 417 to 420). The suggestion is also made (Appellees' Brief, p. 23) that Mr. Gerber purchased this claim "in behalf of the owners or some person or firm interested in the Company". Mr. Gerber's testimony (Apostles, pp. 209 to 210) is direct and positive that this is not the fact. We submit that a reading of the whole record will demonstrate that

Mr. Gerber has not, and never did have, any connection with Pacific Motorship Company, and that he is in no way to be identified with that corporation.

Mr. Gerber's interest is primarily as assignee of the claim of the Australian Government, a mortgage for $344,000, and an equitable mortgage for $1,625,000. In addition to that he has from time to time acquired various maritime liens upon the "Benowa," including, perhaps, a lien for the $5,609.20 tendered to libelants, or to such portion thereof as has actually been collected by them under that tender. Obviously Mr. Gerber is in no way responsible for the failure of Pacific Motorship Company to pay libelants. Even if Pacific Motorship Company should properly be subjected to a penalty under all the circumstances in this case, under the plain language of the statute and under the recent decision of Judge Dooling this penalty can in no way be extended to Mr. Gerber.

IV. The amount of the penalty is computed wrongly.

(Appellants' Brief, p. 46.)

Appellees have conceded this point, making no answer whatever. This alone requires a modification of the decree.

SECOND. LIBELANTS SHOULD HAVE ACCEPTED THE TRANSPORTATION OFFERED BY GERBER AND NOT RECOVERED MONEY IN LIEU THEREOF.

(Appellants' Brief, p. 47; Appellees' Brief, pp. 36 to 37.)

On this point we are satisfied with the discussion in the two briefs already on file, and submit that in this respect also the decree must be modified.

THIRD. IT WAS IMPROPER TO ENTER A DECREE FOR THE SALE OF THE VESSEL UNDER A JUNIOR LIBEL WITHOUT CONSOLIDATING IT WITH EARLIER LIBELS AND INTERVENING LIBELS UNDER WHICH THE VESSEL IS HELD BY THE MARSHAL, AND WITHOUT NOTICE TO THESE LIBELANTS AND INTERVENING LIBELANTS.

(Appellants' Brief, p. 49; Appellees' Brief, pp. 37 to 39.)

Appellees quote (Appellees' Brief, p. 37) from *Hughes on Admiralty.* The passage quoted seems to leave the matter in a state of confusion. The text, however, follows immediately with an explanation of what the writer regards as the proper rule, which is in accord with the rule as laid down in our brief and directly opposed to the practice adopted in this case by the appellees. Appellees also quote Admiralty Rule 25 of the District Court (Appellees' Brief, p. 38), which we submit can have no bearing here, and Admiralty Rule 40 of the Supreme Court of the United States (Appellees' Brief, p. 38), which is absolutely colorless in so far as this particular point is concerned.

Appellees apparently concede our point and attempt to support the decree by going outside of the record to make the statement that Judge Neterer actually did ask their proctor "to notify the other claimants of the hearing, which was done" (Appellees' Brief, p. 38). The only counsel appearing in the various libels filed on the "Benowa", outside of Messrs. Thacher & Wright and Mr. Lillick, are Messrs. Goodfellow, Eells, Moore & Orrick and Mr. Resleure. On our communicating with each of these offices, we were first informed that they had no recollection of any such notice. We asked them to in-

vestigate their records and ascertain whether there was any written notice or any record of any notice whatever. Each of them has advised that no such record exists and no copy of any written notice appears. The court will take these various statements, both on our part and on that of the appellees, for what they are worth. We submit, however, that if the jurisdiction of the court to render a decree is to be determined by ascertaining whether lawyers have recollection of receiving notices which apparently have not been filed and are no part of the record of the court, confusion is bound to arise.

C. Unrelated Matters.

Considerable stress is laid by counsel upon certain matters not discussed in our brief, and which we consider irrelevant to the case.

FIRST. PROVISIONS.

Appellees state in detail (Appellees' Brief, pp. 2 to 3) and quote the testimony (Appellees' Brief, pp. 30 to 31) in regard to an alleged failure on the part of Pacific Motorship Company to supply proper provisions to the "Benowa". As already stated (Appellants' Brief, p. 24), the record shows that there were sufficient provisions on the "Benowa" (Apostles, pp. 63 to 64; 175 to 176).

The whole matter of provisions, however, is outside of the issues of this case. The libel contains no allegations whatever with regard to any deficiency of provisions (Apostles, pp. 12 to 16), nor is there anything in

the decree relating to provisions. It is true that in Judge Neterer's original opinion (Appellants' Brief, p. 7 and appendix) there was a clause in regard to provisions. This clause, however, was eliminated in the supplemental opinion, apparently because the attention of the learned judge had been called to his own earlier decision in *The Rupert City,* 213 Fed. 263, 274 (Appellants' Brief, p. 24), under which case and the authorities there cited it is quite clear that there is no liability for provisions subsequent to March 10th, the date the "Benowa" was taken in charge by the marshal (Apostles, p. 276).

SECOND. DEMANDS UNDER R. S. 4530.

(Appellees' Brief, pp. 3 to 4; 14 to 16; 39.)

Appellees' brief states repeatedly that demands were made by the crew for half their wages in accordance with Section 4530 of the Revised Statutes, which section, as it read before its last amendment, they set forth at length (Appellees' Brief, pp. 15 to 16). This section now provides that "Every seaman * * * shall be entitled to receive on demand * * * one-half part of the balance of his wages * * * at every port where such vessel * * * shall *load or deliver cargo before the voyage is ended.*" As pointed out (Appellants' Brief, p. 3; Appellees' Brief, p. 2), the "Benowa" originally put into San Francisco, not as a port at which she would "load or deliver cargo", but as a port of distress. The statute was, therefore, inapplicable and for that reason the District Court held that the master was justified in refusing the demands for half wages made upon

the arrival of the vessel (Apostles, p. 223). In their oral argument, appellees said that this demand was repeated continually thereafter. There is nothing in the record to support this statement, or to show any such demands, except those made upon the arrival at San Francisco, and before it had been determined that the vessel would remain here. But even demands made after this determination would have been unavailing, because as soon as this determination was made, San Francisco became the port where the voyage ended, and therefore, by the express terms of the statute, was excluded from its operation.

The whole matter is irrelevant, since there is nothing in the libel (Apostles, pp. 12 to 16) relating to any such demands. Moreover, even if any such demands had been made, they could not assist libelants in this appeal, so far as the penalty under *R. S.* 4529 is concerned. It is true that section 4530 provides that where such demands have been made properly and refused it "shall release the seaman from his contract and he shall be entitled to full payment of wages earned." If the demands made on the arrival had been proper, or if proper demands were subsequently made after the vessel's destination had been changed, the result would be that the term of service of libelants would have expired either on February 28th, or on March 9th as the case might be, so that, instead of being entitled to wages up to March 17th as allowed by the District Court, the wages would cease as of February 28th or March 9th. That is, libelants would have been entitled to even less wages than were awarded to them by the District Court.

So far as the penalty under *R. S.* 4529 is concerned, the penalty is imposed by that section only for failure to make payment "*in the manner hereinbefore mentioned,* without sufficient cause." The penal provision of *R. S.* 4529 for failure to pay as provided by that section cannot be carried over into the succeeding section so as to penalize the master or owner for a failure to comply with the provisions of that succeeding section. It follows, therefore, that if *R. S.* 4530 is applicable *R. S.* 4529 cannot be applicable. The two are mutually exclusive.

As we have said, each of the ten points stated in our brief and mentioned again in this supplemental brief is sufficient to require either the modification or the absolute reversal of the decree. We have answered specifically in their proper order hereinabove those portions of appellees' brief which relate to each of these various points and have, we submit, demonstrated sufficiently that nothing which has been adduced by appellees in any way answers the arguments originally outlined by us. We submit also that the two unrelated matters, to which appellees have so frequently referred, have no bearing whatever upon the case. We, therefore, respectfully submit that the decree must be reversed.

Dated, San Francisco,
November 12, 1921.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellants.

OSCAR SUTRO,
FELIX T. SMITH,
Of Counsel.

No. 3749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. GERBER, JR., and ANGLO-CALIFORNIA TRUST COMPANY (a corporation),

Appellants,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD and D. W. DAVIS,

Appellees.

APPELLEES' REPLY TO SUPPLEMENTAL BRIEF FOR APPELLANTS.

IRA S. LILLICK,
Proctor for Appellees.

J. ARTHUR OLSON,
Of Counsel.

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Appellees.

APPELLEES' REPLY TO SUPPLEMENTAL BRIEF FOR APPELLANTS.

The supplemental brief for appellants is to a great extent a repetition of the matters set forth in their

opening brief. Counsel claim that appellees have accused them of omitting certain facts. Such accusation was made. In their opening brief counsel for appellants stated that the Benowa put into San Francisco in distress but no reference was made to the fact that the Master informed the owners that the vessel was short of provisions. In our opening brief we stated that it was necessary for the crew to furnish their own provisions during the time that they were in port at San Francisco, with the exception of five or six days, during which period certain supplies were furnished by the Pacific Motorship Company (apostles p. 63). Counsel for appellants refer to appellees' brief in which we are charged with drawing a pitiful picture of the straits in which libelants were left by their inability to collect their wages promptly. We have quoted the facts as they appear in the record and the facts speak for themselves, and any picture thus apparent in the mind of counsel for appellants is a reflection of the cold facts.

Counsel for appellants cite the case of *Petterson v. U. S.*, 274 Fed. 1003, to support the claim that this particular crew consisted of men belonging to a different class from that of the ignorant seamen whose rights courts of admiralty have been accustomed to consider. It is the first time that such an argument has come to our attention. The members of this crew were as human as the ignorant seamen to which counsel refer; their needs were just as pressing, as we have already stated, they were

strangers far from home. This crew, as has been pointed out, arrived in S. F. February 28th, 1921, having left Baltimore January 21st, 1921, and had no funds whatsoever. It became necessary for the Master to personally advance small amounts to various members of the crew (apostles p. 72).

The record clearly shows that the men received credit from a Wholesale Grocery Company in San Francisco for their provisions, and that they had received nothing whatsoever save in one or two instances where a small advance was made to one of the members of the crew to be sent to his wife prior to the arrival of the vessel in San Francisco. The credits which are given to the account of the vessel, or the owners, are for supplies obtained by the men from the slop chest on board the vessel. The record shows that these men all came from the eastern section of the United States, and were signed on at Baltimore, Md. Counsel lay particular stress upon the fact that the Shipping Articles show that one of the members of the crew was born in California. It does not appear, however, that he later moved to the east coast. It may be as counsel says that several of the members of the crew have remained in San Francisco, as there are several of the crew who did not accept the compromise offered to them. Several of them are still here waiting for a final determination of their claims. On page 37 of their brief counsel say that a majority of the crew accepted their wages June 2nd, the date the final decree was filed. We have no knowledge

other than from the satisfaction or releases which are on file in the lower court. These settlements having been made directly with the libelants and without notifying their counsel. How desperate the needs of those men, what arguments were used with them to persuade them to forego those rights which the lower court held them entitled to claim, we have no means of knowing. They may have returned from other voyages, but that does not alter the fact that they were depending upon the wages due them for their expenses and the necessaries which the owners failed to provide them with upon their arrival in San Francisco; nor does it relieve the owners of their agreement to provide transportation for them to the port of shipment, so that presumably they could be at their homes where they could receive such assistance as might be available.

Counsel for appellants claim that there is nothing in the record to show that the libelants were ignored. Our opening brief clearly sets forth the portions of the record relating to the treatment that the crew received, and how they were forced to obtain credit for provisions without any assistance whatsoever from the owners of the vessel, by agreeing that the cost of these provisions should be deducted from such money as they might obtain in this proceeding; also that they were ordered to leave the vessel in a strange community where they had neither families nor friends, and this without their receiving the wages for which they had worked and which they were entitled to receive.

If the representatives of the Pacific Motorship Company never had any conversations with the crew, it was because these representatives avoided taking the matter up with the crew, or with anyone in their behalf. This is clearly shown by the testimony of Shipping Commissioner Mr. Walter McArthur (apostles pp. 83-84) and Patrick Baird, accountant for the Pacific Motorship Company (apostles p. 194).

Counsel for appellants have cited the case of *Vincent v. U. S.,* 272 Fed. 889, in support of a contention that the receipt of the full wages up to the date of the tender was a waiver of any penalty for the intervening period. We cannot agree with this construction. The court properly ruled that the master without sufficient cause refused to pay the appellees, and we are also of the opinion that the payment which was made on their arrival at San Francisco of full wages should have been credited as part payment of the penalty provided for in the statute, as was stated in the recital of facts preceding the opinion.

The court further found that the appellees were entitled to payment as penalty under Section 4529 of the Revised Statutes * * * double pay from March 4th to April 26th, and that having been already paid single pay if they were awarded by the court double pay for the same period, the result would be that they would be thrice paid, and that equity and justice required no more than the payment of double wages covering the period of de-

fault. We submit that the tender referred to here by the appellant (see page 45 apostles) neither expressly nor by implication waives any rights which the appellees may have had to further prosecute their claims for the additional wages which they are claiming. This tender did not cover the amount due at the date it was made for the reason that libelants were entitled to double pay from the time that their wages became due, and in addition to this fact, the libelants had been supplying their own provisions from a time approximating 5 days after their arrival in the port of San Francisco (apostles p. 63).

Counsel for appellants cite the case of the *Pacific Mail Steamship Company v. Smith,* 241 U. S. 245, as holding that a shipowner has the right to contest his liability for the penalty and to delay the payment of the penalty while this contest is pending, without incurring additional penalties, but even that pending such contest in regard to the penalty he may delay the payment of the wages themselves. This case goes no further than to hold that the shipowner has a right to delay the payment of wages and the penalty which attaches for non-payment of wages *pending an appeal from the decree of the District Court.*

Counsel for appellants have repeated in their supplemental brief the misstatement made in their opening brief that libelant's proctor agreed that the penalty should cease to run on May 17th. Such an agreement was never made. We repeat: It was sug-

gested by Judge Neterer because he was leaving for Seattle, and the decree was not in a form which was agreeable to him. Counsel for claimant at that time objected to the delay that would ensue in preparing and forwarding a new decree to Judge Neterer at Seattle. The reason that Judge Neterer made this suggestion was that he was aware of the desperate position of the crew at that time, and he knew that in case of an appeal from the decree the crew might obtain the straight wages then due them and leave the question of the double wages to the Circuit Court of Appeals for final determination. The result desired by Judge Neterer would have put it beyond the power of the appellants to trade on the desperate financial condition of the crew and attain what, we think, amounted to an unconscionable advantage over those unfortunate men with whom, by the releases filed in court, they have settled for amounts less than actually due.

We submit that the matter set forth in the apostles, pages 239 to 242, contains no statement that an agreement was made by proctor for libelants that the penalty should cease. Rather, it confirms our own contention that the entire matter arose out of the suggestion made by Judge Neterer.

It has been our contention from the first that the double pay should run from the time the court found the payment of wages was refused until the entry of the final decree, and for that reason we could not in justice to our clients stipulate that it should cease. Had the court actually decreed that

the double pay should cease upon a specified date, as the court might have done had he been so advised, we would not have been asked to so stipulate, but this was entirely a matter for the court to decide, and as the court did not specify in its opinion that double pay should cease on May 17th, it was not for us to stipulate as to any date from which prior to the date which we then contended, and ever since have so contended, they were entitled to receive double pay, viz.: the date of the final decree.

Counsel for appellants attempt to distinguish the statute which was in question in the case of *Covert v. British Wexford,* 3 Fed. 577, from this by stating that the statute there in force was fundamentally different from our R. S. 4529. The principle of the statute there construed is the same as the present statute in force. Here, Congress has seen fit to extend the time within which additional wages are to continue, subsequent to the refusal of payment of wages due, and the same principle as to liquidated damages would apply whether the time were to run 10 days or 100 days. The members of this crew were kept waiting for wages rightfully due them and compelled, in the meantime, to subsist as best they could. Were the course of appellants approved in this case, unprincipled owners would soon seize upon the expedient of abandoning their crews in similar situations and after tiring them out, or to put it baldly, after starving them out, settle with them for the least possible amount regardless of their rights. Counsel for appellants state that no spe-

cific suggestion is made as to what steps Pacific Motorship Company should have taken, or as to just who would have accepted an hypothecation of security for a lien. This is a matter that rests with the Pacific Motorship Company and cannot be shifted upon the crew or their counsel who had no voice whatever in the management of the company.

The libelants had the first lien against the vessel and they could look to the vessel itself. If the holders of a mortgage had an interest to protect, it rested with them to see that this prior lien was paid. This is the same duty which a holder of a mortgage on real property has—that is, to satisfy a prior lien in order to protect his own interests if the occasion arises. When Mr. Gerber purchased the mortgages existing against this vessel, he knew that the libel was pending. A business man, as we must assume Mr. Gerber to be, would not purchase a mortgage against a vessel with prior liens upon her, unless in his judgment that vessel was worth more than the amount which was being paid for her plus the value of any prior liens that were outstanding.

Counsel for appellants again refer to the alleged assignment which they claim to have made to Ira S. Lillick, as attorney for the libelants, but this matter has been fully covered on pages 33, 34 and 35 of our opening brief. It is now claimed that this alleged assignment fully acquitted the Pacific Motorship Company from any further responsibility to

the crew—yet the facts disclose that no release from the demands of the crew was requested at the time this order on the Navy Department was given and if at the time it was given it was not delivered under a misapprehension as to the right to execute it, which is the charitable assumption, it was given as a means of working a fraud. This latter assumption we have never drawn as we believe Mr. Comyn believed he was arranging to collect the balance due for the freight, which, if the attempt were successful would have terminated the dispute.

Counsel for appellants rely upon the fact that the claim made upon the Navy Department called for the sum of $10,395.83 due the crew. This amount was to cover wages up to the time that they were due, together with transportation, and any additional amounts that may have been due under the articles, or by reason of the non-payment of the wages at the time they were due. This amount was not objected to by Mr. Comyn, the representative of the Pacific Motorship Company, nor would this amount have been paid, but was only to have been withheld subject to the amount due the crew being paid out of said sum. No objection was ever made by the Pacific Motorship Company as to the amount due the crew, and their only claim was that they did not have funds with which to meet the payroll presented to them. In fact the payroll was presented to the receiver and to the attorneys by the master and officers of the crew as the Pacific Motorship

Company had no records other than those they obtained from the master of the vessel.

We have pointed out in our original brief answers to the claims of counsel that excessive claims were made by the crew. We submit that the record shows that at no time did the owners of the vessel tender the amounts due to the members of the crew. The tender of April 27th was not the amount due upon that date. The court so found. The answer of the receiver referred to by counsel denies that libelants are severally, or otherwise, or at all, entitled to wages from the date of shipping and sailing of said vessel to the date of said libel (see Article 4, apostles p. 23).

Counsel for the appellants have referred to the case of *The "Moshulu"* decided by Judge Dooling and state that the mortgage of the Shipping Board involved therein was not a preferred mortgage. This is not a correct statement. The United States claims that the mortgage is a preferred mortgage. It was drawn for, and accepted as such, a preferred mortgage but the document was introduced in evidence at the hearing of said case and is now in the custody of the United States district clerk as an exhibit. It speaks for itself. In that case the vessel was sold under a libel filed in behalf of the crew, and the money was paid into the registry of the court. If the penalty had continued until the entry of the final decree, there would not have been a sufficient amount to pay the other lien claimants. There is nothing in the record to show that this would have been the

result had the "Benowa" been sold. The fund upon which claims could be made against the "Moshulu" was fixed, while in this case the value of the "Benowa" has not been determined. We must assume therefore that in view of the fact that W. E. Gerber, Jr., purchased the interests of the mortgagor of the "Benowa" subject to the rights of claimants holding prior liens that said motorship "Benowa" is of a value equal to or greater than the sum total of the then existing valid lien claims against her.

On page 24 counsel for appellants state that Mr. Gerber's interest is primarily as assignee of the claim of the Australian Government for the amounts set forth therein. Counsel claim that Mr. Gerber is in no way responsible for the failure of the Pacific Motorship Company to pay libelants. That may be true, but the libelants are entitled to the respective amounts due them against the owners, and if the owners do not pay said amounts, they have a lien against the vessel, and anyone claiming under any subsequent lien must necessarily become liable for the payment of any liens prior to the claim of the mortgagee.

Counsel claim that the amount of penalty is computed incorrectly. The decree was submitted to the court, and such objections made as counsel for claimants desired to make, and any objections could have been presented to the court. We submit that the method adopted by the counsel for libelants was correct in that the pay of the members of the crew is

computed by taking one-thirtieth of the amount of their monthly wages as the basis for computing the daily wage. The statute provides double pay for each day payment is withheld, without sufficient cause.

Counsel for appellants claim that we concede the point that it was improper to enter a decree for the sale of the vessel under a junior libel, without consolidating it with earlier libels. This is absolutely untrue. We did refer to the fact that upon suggestion of Mr. Thatcher that other libels were pending Judge Neterer requested counsel for libelants to notify other claimants because this suggestion was made. Messrs. Thatcher & Wright appeared before the court and made objections upon the grounds that there were other libels. Mr. Resler of Mr. Denman's office which represented certain interests was notified as was also the office of Messrs. Goodfellow, Eells, Moore & Orrick.

Any of the claimants having prior rights could have appeared in the action and made such objections as they deemed necessary to protect any interests which they may have had in the vessel at the time proclamation was made in this case but none appeared save the Commonwealth of Australia (apostles p. 27).

The record shows that when the various demands for wages were upon the master of the motorship "Benowa" and the owners and/or agents of the vessel that no objection whatever was raised as to the amount of wages due the men. Mr. Baird the ac-

countant for the Pacific Motorship Company testified that the Pacific Motorship Company had no money to pay the crew and that was the only reason they were not paid (apostles pp. 196-197).

Mr. Baird also testified that when Mr. Moran the purchasing agent of the Pacific Motorship Company made up the payroll that he obtained it from the ship (apostles p. 196).

Captain Kenny the master of the vessel testified that the only reason for not paying the wages was that the company was without funds (apostles p. 70).

The affirmative defense set up in the answer of claimant sets up the same defense (apostles pp. 24-25). As a matter of fact, the record shows that when the question of wages and/or the furnishing of provisions was taken up the officers and/or representatives of the owners of the "Benowa" avoided and refused to discuss the subject with the United States Shipping Commissioner Walter McArthur (apostles pp. 193-194).

The testimony of Captain Renny shows conclusively that continual demands were made upon him by the crew for wages and for provisions and that in turn he directly and through the United States Shipping Commissioner made demands upon the owners and representatives of the owners for wages and provisions for the crew and there is not an iota of evidence to show that any question was raised as to the amount due the respective members of the crew.

In the schedule attached to the libel the amounts set opposite each libelant's name include an amount covering wages due, transportation to Baltimore, subsistence and wages enroute and this is the entire basis of the claim that the crew were making excessive demands. We submit that this claim is not supported by the record but on the contrary it clearly shows that this question was never raised in the lower court other than by the general denial in the answer that the wages claimed were not due. There is no special defense pleaded raising this question and the first time this contention was made was in the briefs filed in this court.

The appellants have cited the case of *The Express,* 129 Federal, pages 655-656, as authority for claiming that it is necessary to allege that the delay in payment of wages was without sufficient cause. The portion of the opinion in reference to this point appears on page 656 wherein the court says:

> "In the first place, the libel does not allege any facts showing that the refusal was without sufficient cause."

The question arose in that case as to whether or not the men had a right to arbitrarily leave the ship and the court in deciding the case against the libelants held that there were no facts showing that the refusal was without sufficient cause. In this case, we have introduced in evidence the shipping articles and made the allegations as to the voyage and have clearly alleged that the men were entitled to their wages in accordance with those shipping articles.

Counsel for appellants contend that when admiralty has jurisdiction as, for instance, in a suit on a maritime lien, it will exercise that jurisdiction with regard to the property rights of all parties, whether or not they may have maritime liens, but it is well settled that it is only after the maritime liens have been satisfied that the court will consider claims which do not constitute a maritime lien against the res. It is also well settled that any maritime claimants may petition for any remnants or proceeds that are left after the lien claims have been satisfied.

The Conveyor, 147 Federal Rep. 586.

Counsel have contended that the filing of this libel was premature. We call to the attention of the court the case of the *Annie Smull,* Federal Cases No. 423, in which the court in its opinion on pages 984 and 985 says:

> "After some conflict of opinion the clause in the act, 'and the cargo or ballast be fully discharged', has been construed by the courts as being applicable only 'to those cases in which, either by express terms of the contract or by the established custom of the port, the crew are bound to stay by and unload the ship, and are actually retained in service for that purpose'. But where there is no such contract or usage, the wages become due on the day of the termination of the voyage—the seaman's discharge —and he is entitled to process against the vessel on the eleventh day thereafter—the ten days being computed from the termination of the voyage, when the wages become due without reference to the discharge of the cargo or ballast. 2 Conk. Adm. 48.

> It does not appear that there was any contract in this case, to stay by the ship until the cargo was discharged, or that there is any established custom requiring the seamen to do so, and ten days having elapsed from the ending of the voyage before the issuing of process, this exception is not well taken and must be disallowed."

The facts in this case come within the law as decided in the above case. The statute now in force is two days instead of ten days (Sec. 4529, Revised Stats. U. S.). The crew demanded their wages both prior to and at the time that it was decided that San Francisco was to be the port of discharge. This was decided, on or about March ninth or tenth; as it appears in the testimony of R. J. Spencer, the first mate, that on March 12th tugs came alongside the vessel to bring it to California City for discharging its cargo.

In the case of *"The Mary"*, Federal Cases 9191, the court held that whether the seamen are bound to remain by the vessel after the voyage is ended and assist in discharging the cargo depends on the custom of the port. The appellants have failed to show that it is the custom of the port for the crew to assist in discharging the cargo, and there is no provision in the Shipping Articles requiring this to be done. We must, therefore, assume that the failure to produce testimony to that effect is an admission that there is no such custom in the port of San Francisco.

In the case of *The "Catalonia"*, 236 Fed. Rep. at pages 555 and 556 the court in construing the Shipping Articles stated in its opinion:

> "The master's contention would make the articles too indefinite as to the extent of the voyage; and the same could be avoided for uncertainty and ambiguity, if such an interpretation should be placed upon them. Such view might operate unfairly to the seamen, who belong to a class who are ever entitled to the consideration of a court of admiralty; and, moreover, as between themselves and the master, the articles should be construed liberally in their favor, since the same were the product of the master, and not of themselves."

We respectfully submit that the decree of the lower court must be affirmed.

Dated, San Francisco,
December 28, 1921.

IRA S. LILLICK,
Proctor for Appellees.

J. ARTHUR OLSON,
Of Counsel.

No. 3749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. GERBER, JR., and ANGLO-CALIFORNIA TRUST COMPANY (a corporation),

Appellants,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD and D. W. DAVIS,

Appellees.

APPELLANTS' MEMORANDUM
Regarding Appellees' Reply to Supplemental Brief for Appellants.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellants.

OSCAR SUTRO,
FELIX T. SMITH,
Of Counsel.

Topical Index

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Appellees.

APPELLANTS' MEMORANDUM
Regarding Appellees' Reply to Supplemental Brief for Appellants.

REQUEST FOR LEAVE TO FILE THIS MEMORANDUM.

Libelants' proctor says:

> "The supplemental brief for appellants is to a great extent a repetition of the matters set forth in their opening brief" (Appellees' Reply, pp. 1-2).

Libelants, on the other hand, in their reply have departed to such an extent from the position they adopted in their main brief (*infra,* pp. 3, 4, 9, 11, 12, 15, 16, 18, 19) that we feel that we are justified in asking this court for leave to file this memorandum.

Libelants, having taken for the preparation of their Reply Brief more than twice the time originally allowed by this court, cannot complain that the decision of the case is delayed by the consideration of this memorandum. For the burden imposed upon the court, we humbly crave its indulgence.

The arrangement of the reply is similar to that of libelants' main brief, accordingly we adopt the same arrangement as in our supplemental brief.

A.

Appellees' Brief.

In their main brief libelants made the following direct accusation:

> "Appellant omits mention of the following salient facts:
>
> The testimony of the master shows that the vessel put into the port of San Francisco in distress on February 28, 1920, and that while the vessel was in the harbor of San Francisco arrangements were made for discharging her cargo at California City, on San Francisco Bay, instead of discharging her at Bremerton, Puget Sound, as originally con-

templated under the contract of affreightment (Apostles, p. 65)."

(Appellees' Brief, p. 2.)

In our supplemental brief we pointed out that there was no such omission (Appellants' Supplemental Brief, p. 2; Appellees' Brief, p. 3). Libelants now admit that they made the accusation. The retraction is lame.

"In their opening brief counsel for appellants stated that the 'Benowa' put into San Francisco in distress" (Appellees' Reply, p. 2).

With admirable agility, however, libelants now shift their position and make a different accusation:

"But no reference was made to the fact that the master informed the owners that the vessel was short of provisions" (Appellees' Reply, p. 2).

As we have already pointed out (Appellants' Supplemental Brief, pp. 26-27), and as libelants apparently concede (*infra,* p. 20), the whole matter of provisions was immaterial and responsive to no issue in this case.

Libelants still harp on their straits while in San Francisco (Appellees' Reply, pp. 2, 3, 8). As in their main brief (Appellants' Supplemental Brief, p. 3), there is no citation of the record in support of these general statements, and the fact is that they are unsupported by the record. Indeed, referring to libelant Davis, a native Californian (Apostles, p. 443; Appellants' Supplemental Brief, p. 3), libelants now say:

"It does not appear, however, that he later moved to the East Coast" (Appellees' Reply, p. 3.)

This is precisely our position, and no such fact appearing, the court may well assume that he now resides in California, and not in some Eastern city, as libelants' proctor would have it believe.

Libelants cite the record as showing that Pacific Motorship Company avoided meeting the crew or "any one in their behalf" (Appellees' Reply, p. 5). The record in regard to this incident shows clearly there was no attempt to avoid the issue. As the shipping commissioner says:

> "I rang up the firm * * * at that time, the question was as to how the crew was to be fed" (Apostles, p. 82).

Mr. Moran, the purchasing agent and port steward, had been supplying the provisions (Apostles, p. 183), and the commissioner was referred to him (Apostles, p. 194). In response to the commissioner's request, Mr. Moran called at his office (Apostles, p. 179). At this call, however, the commissioner asked him:

> "Did he propose to discharge the crew and pay them their wages" (Apostles, p. 83).

This was a matter with which Mr. Moran had nothing to do (Apostles, p. 184), and as to which he naturally could not answer the commissioner. On the issue of provisions he answered the commissioner fully (Apostles, p. 180).

Proctor for libelants now attempts to make capital out of the fact that many of the libelants have agreed to an amicable settlement (Appellees' Reply, pp. 3, 4, 7, 8), saying:

> "These settlements having been made directly with the libelants and without notifying their counsel. How desperate the needs of these men, what arguments were used with them to persuade them to forego those rights which the lower court held them entitled to claim, we have no means of knowing" (Appellees' Reply, p. 4).

All this is manifestly outside the record, which simply shows (Apostles, pp. 9 to 11) that on certain dates certain libelants filed acceptances of tender, and thereafter at various intervals filed satisfactions. The acceptances of tender related to the *wages* which Mr. Gerber had tendered and deposited in court. The satisfactions related to the disputed *penalty* and the *transportation* and *subsistence* awarded by the decree. These are two separate matters which libelants' proctor now attempts to confuse (Appellees' Reply, pp. 3, 4, 7). While we see no object in arguing this case on matters so far outside the record, it may not be out of place to put the facts before the court.

The acceptance of the wages to which we referred in our opening brief (Appellants' Brief, p. 37) was conceded by libelants in their main brief and at the oral argument and is now questioned for the first time (Appellees' Reply, p. 3). The acceptance of tender filed June 2nd, 1921, under which a majority of the libelants accepted their wages, as well as that for other libelants filed on May 24th, were prepared by their proctor. It is our information also that the acceptances filed on June 7th, 17th and 22nd were also prepared by libelants' proctor. In any event, neither the

appellants nor ourselves had anything to do with the preparation of these acceptances or with the drawing of the wages, except that we were present in the office of the clerk on May 24th when the first acceptance was filed.

The situation in regard to the satisfactions is slightly different. Shortly after May 24th, 1921, and prior to the entry of the decree, we discussed with a representative of libelants' proctor and with certain of libelants themselves, the desirability of settling this wholly unprofitable litigation. At the instance of the representative of libelants' proctor it was then arranged that an interview take place at Mr. Gerber's office, at which an effort might be made to settle the dispute. In accordance with this arrangement certain of libelants appeared at Mr. Gerber's office, and during the discussion Mr. Gerber made a proposition of settlement which seemed to him fair. The libelants did not accept the proposition at that time. Some days later several of libelants called at Mr. Gerber's office and asked whether this proposition was still open. Thereafter from time to time various libelants called at Mr. Gerber's office to receive payment in accordance with this proposition and signed the satisfactions which are on file in the District Court. No effort was made to induce libelants to make the settlement and no arguments were used. In certain instances we know personally that they were urged individually to obtain the advice of their proctor before making the settlement.

It will be noted that in each instance the tender was accepted and the wages paid before the filing of the satisfaction, the interval being in some cases very considerable (*e. g., Crawford,* May 24th to July 7th; *Spencer,* June 7th to July 27th). As soon as these men filed their acceptances, the result the desire for which proctor for libelants now imputes to Judge Neterer (Appellees' Reply, p. 7), was attained, the men had obtained their wages and the question of the penalty was left open. As proctor for libelants puts it, it was then

> "beyond the power of the appellants to trade on the desperate financial condition of the crew and attain what, we think, amounted to an unconscionable advantage over these unfortunate men" (Appellees' Reply, p. 7).

Relieved of their financial embarrassment by their ability to collect the wages which had been tendered to them more than a month previously, these libelants were in a position to negotiate at arm's length with Mr. Gerber, and having done so to make what seemed to them a proper settlement. The satisfactions (not shown in the record, but filed in the District Court) in each case recite the amount actually paid in settlement. An inspection will show that the settlement was a liberal one.

B.

Appellants' Argument.

FIRST: THE PENALTY.

I. Under no circumstances can any penalty be imposed for any period subsequent to April 27, 1921, the date of the tender to libelants, under which more was deposited in the registry than was subsequently awarded to libelants as wages.

(Appellants' Brief, p. 17; Appellees' Brief, pp. 7-10, 32; Appellants' Supplemental Brief, p. 5; Appellees' Reply, pp. 5-8.)

Through inadvertence, libelants' proctor has failed to apprehend our views of *Vincent v. United States,* 272 Fed. 889 (Appellants' Supplemental Brief, p. 5; Appellees' Reply, p. 5). We agree with libelants' proctor that the case holds that the receipt of the full wages up to the date of the tender was not a waiver of any penalty for the intervening period.

Similarly, libelants' proctor has misapprehended our understanding of the terms of the tender made by Mr. Gerber (Appellants' Supplemental Brief, pp. 5-6; Appellees' Reply, p. 6). We agree with the thought libelants' proctor evidently attempts to express when he says that this tender

> "neither expressly nor by implication waives any rights which the appellees may have had to further prosecute their claims for the additional wages which they are claiming" (Appellees' Reply, p. 6).

As pointed out already (Appellants' Supplemental Brief, pp. 5-6), it necessarily follows from the foregoing that libelants could have accepted the tender

made by Mr. Gerber, which covered wages up to March 17th, without any prejudice to their claim that they were entitled to the penalty for the intervening period. The only reason offered in libelants' main brief why they did not accept the tender was that, if they had,

> "they would have been without any remedy for the time they had lost from March 17th to April 27th" (Appellees' Brief, p. 8).

The position now taken by libelants, therefore, on these two points is directly contrary to the position stated in their main brief.

Again we agree with libelants' proctor that the case of *Pacific Mail Steamship Company v. Schmidt,* 241 U. S. 245-250 (Appellants' Brief, p. 19; Appellants' Supplemental Brief, p. 6),

> "goes no further than to hold that the ship-owner has a right to delay the payment of wages and the penalty which attaches for nonpayment of wages pending an appeal from the decree of the District Court" (Appellees' Reply, p. 6).

To support our position, however, it is not necessary to go further than this, or even to go as far as this. Surely if an employer may contest the right of seamen to the penalty *after* a court has held the penalty due, he is entitled to contest it before there has been any such ruling, and certainly, if he is entitled pending the contest to withhold both the wages admittedly due and the penalty he is contesting, without incurring an additional penalty, there can be no question as to the application of an additional penalty where he offers to

pay the wages due and merely contests the penalty itself. We submit, therefore, that the case in question is controlling of this phase of the case at bar.

In discussing the agreement of May 17th, that the penalty should cease to run on that date (Appellants' Brief, pp. 19-20; Appellees' Brief, p. 7; Appellants' Supplemental Brief, pp. 6-7), libelants' proctor has made elaborate statements (Appellees' Reply, pp. 6-8) as to his understanding of occurrences not shown by the record. This discussion, however, adds nothing material to the showing in the record itself (Apostles, pp. 239-240), which we submit sustains the position we have taken throughout.

II. No penalty should be imposed for any period subsequent to March 26, 1921, the date of the appointment of the receiver.

(Appellants' Brief, p. 20; Appellees' Brief, pp. 11-13, 19-21, 22-23; Appellants' Supplemental Brief, p. 8.)

The reply contains no discussion of this point.

III. No penalty at all should be imposed.

(a) There was sufficient cause for the delay in the payment of the wages.

1. *The financial condition of Pacific Motorship Company made the payment impossible.*

(Appellants' Brief, p. 30; Appellees' Brief, pp. 4, 13-14, 17-19, 23-26; Appellants' Supplemental Brief, p. 10; Appellees' Reply, pp. 8-9, 12.)

Libelants' discussion of *Covert v. British Brig Wexford* (Appellees' Brief, p. 28; Appellants' Supplemental

Brief, pp. 10-11; Appellees' Reply, p. 8) and of the other points already discussed under this phase of the case, adds nothing to what has already been said.

An entirely new point is now made, however (Appellees' Brief, pp. 9, 12), that the mere fact that Mr. Gerber purchased a mortgage interest in the "Benowa" is evidence that the "Benowa" was worth more than the amount of the maritime liens against her. The fact, however, that the claim of the Australian Government was an equitable mortgage for $1,625,000.00, covering eight vessels (Appellants' Brief, pp. 2-3; Apostles, pp. 303-347), shows clearly that such purchase cannot be evidence of the existence of an equity over the maritime liens on any one vessel.

2. *The dispute as to the amount of wages due justified refusal to pay until this could be adjusted.*

(Appellants' Brief, p. 37; Appellees' Brief, pp. 10-11, 31-32, 32-33; Appellants' Supplemental Brief, p. 14, Appellees' Reply, pp. 10-11, 13-14.)

We are still in the dark as to just what libelants' original claim of $10,395.83 is intended to cover. As we have pointed out (Appellants' Brief, p. 37; Appellants' Supplemental Brief, p. 15), in the libel and in the demands made on the Navy Department this sum was stated to be simply "wages". In their main brief libelants asserted "without fear of contradiction" that this sum was simply the amount actually due, adding that it included

> "the wages due, transportation and subsistence during time of transportation" (Appellees' Brief, p. 10).

We have demonstrated that this statement cannot possibly be true, setting forth the figures showing that the amount of wages, plus transportation and subsistence, in no case was equal to the amount demanded and in all cases but one was very considerably less than the amount demanded (Appellants' Supplemental Brief, pp. 16-18). When this was pointed out at the oral argument, libelants asked leave to consider the matter over the noon hour, and after that time had expired, challenged our figures in no way. Their reply, written after they have had two months in which to consider the matter, also ignores this computation entirely. Their present position is stated that:

> "This amount was to cover wages up to the time that they were due, together with transportation, and any additional amounts that may have been due under the articles, or by reason of the non-payment of the wages at the time they were due" (Appellees' Reply, p. 10).

No explanation is made as to just what these additional amounts were, or how they were computed. It is apparent, however, that libelants now attempt to construe their original demand as including something more than either wages, transportation or subsistence.

As pointed out by libelants (Appellees' Reply, pp. 10-11, 13-14), the employers in this case were dependent entirely upon libelants themselves for a statement and account as to the amount due them. It is true that

when the demand was originally made, Mr. Comyn acceded to it to the extent of assigning to libelants' proctor twelve thousand dollars ($12,000.00) out of the freight funds. This, however, was not an admission that twelve thousand dollars ($12,000.00) was due. Indeed, libelants now confirm the statement they made at the oral argument (Appellants' Supplemental Brief, p. 19), saying:

> "Nor would this amount have been paid, but was only to have been withheld subject to the amount due the crew being paid out of said sum" (Appellees' Reply, p. 10).

3. *The acceptance by libelants of the assignment of freight money made it unnecessary for Pacific Motorship Company to pay libelants from some other source.*
(Appellants' Brief, p. 39; Appellees' Brief, pp. 4-6, 33-34; Appellants' Supplemental Brief, p. 19; Appellees' Reply, pp. 9-10.)

The present argument of libelants on this point, while "charitably" disclaiming any such intention, is simply a ponderous hint that Mr. Comyn gave it "as a means of working a fraud" (Appellees' Reply, p. 10), the precise nature of which is not any more definitely explained.

Every inference to be drawn from the nature of the transaction and its surrounding circumstances is directly to the contrary. As we have said, the nature of the fraudulent purpose of Mr. Comyn is not explained. He could have had no motive whatever for perpetrating any such fraud. The corporation which he represented was at the time known to be insolvent (Appellants' Brief,

p. 3; Apostles, p. 200). Any sum out of which libelants might have been defrauded would have gone to the benefit of the holders of maritime liens and of the Commonwealth of Australia under its mortgage. Mr. Comyn had no connection with the holders of maritime liens, and at that time was being sued by the Commonwealth of Australia (Apostles, p. 300). Proctor for libelants, however, had, two days previously, entered into a contract with libelants (Apostles, p. 133), the contents of which he has refused to divulge (Apostles, pp. 145-148). As he concedes, if a valid assignment had been made and accepted by him, libelants' claim would have been limited to the wages. On the other hand, if the assignment should prove to be a nullity, their claim would be enhanced by the amount of the penalty. As we have shown (Appellants' Brief, p. 8), the amount of the penalty awarded by the lower court was almost three times the actual claim for wages. There was no defect in Pacific Motorship Company's title to the assigned funds, since Houlder, Weir & Boyd admittedly received them only as agents for Pacific Motorship Company (Apostles, p. 360), nor has it ever been claimed that Mr. Comyn did not have power to act for Pacific Motorship Company. The only infirmity in the assignment asserted by libelants relates to the form of the transaction. In making the assignment, Mr. Comyn, a layman, was dealing with libelants' proctor, learned in the law, and the assignment was made in the form suggested by the latter (Appellants' Supple-

mental Brief, p. 20; Apostles, pp. 204-205). Libelants' proctor now attacks the sufficiency of this form.

(b) There is no allegation that the delay in payment was without sufficient cause.

(Appellants' Brief, p. 42; Appellees' Brief, p. 35; Appellants' Supplemental Brief, p. 21; Appellees' Reply, pp. 15, 16-18.)

Libelants now quote *The Express,* 129 Fed. 655-656, upon which we rely and which we submit decides that such an allegation is necessary. The fact that another point was also determined in the decision does not destroy this case as authority upon the point for which we cited.

No such claim having been made in their main brief, it is not clear to us from the libelants' last sentence (Appellees' Reply, p. 15) whether they intend now to claim that such an allegation was made. An inspection of the libel, however, makes it clear that the allegations go no further than to show, as libelants' proctor now says,

> "that the men were entitled to their wages in accordance with those shipping articles" (Appellees' Reply, p. 15),

which is, of course, a very different thing from a showing that the refusal was without sufficient cause.

In discussing this matter in our opening brief we pointed out (Appellants' Brief, p. 43) that the libel showed on its face that it was prematurely filed. In their main brief and at the oral argument libelants conceded this point. An elaborate argument, however, is

now made to the contrary (Appellees' Reply, pp. 16 to 18).

The statute involved in *The Annie M. Smull,* Fed. Cas. No. 423 (Appellees' Reply, p. 16), and *The Mary,* Fed. Cas. No. 9191 (Appellees' Reply, p. 17), was materially different from that in the case at bar. The allegation there that the voyage had ended was held sufficient with- charged. The present statute, however, fixes the time out a further allegation that the cargo had been dis- for the payment of the wages definitely with relation to the time when the cargo had been discharged. Even if there were an allegation in the libel that the voyage had ended, this would not be sufficient to override the statute.

The Catalonia, 236 Fed. 554 (Appellees' Reply, p. 18), has no bearing whatever on this matter. It merely holds that a construction of the shipping articles author- izing the indefinite prolongation of the voyage by failure of the master to proceed to the port of destination named, would be unreasonable.

All doubt on the question as to whether this libel was premature or not, however, is set aside by the fact that the District Court expressly found that the voyage continued and wages were due up to March 17th, two days after the date the libel was filed.

(c) The effect of the decree is to penalize not the owners of the vessel, but those having liens upon it.

(Appellants' Brief, p. 44; Appellees' Brief, pp. 13, 22, 24, 35-36; Appellants' Supplemental Brief, p. 21; Appellees' Reply, pp. 11, 12, 16.)

In reference to the recent decision of Judge Dooling in *Sjogren v. The Moshula* (Appellants' Supplemental Brief, pp. 21-22) we said that the mortgage there involved was not a preferred mortgage. In reply libelants now say:

> "This is not a correct statement. The United States claims that the mortgage is a preferred mortgage" (Appellees' Reply, page 11).

The record in that case speaks for itself. The brief of the *amicus curiae,* upon the strength of which Judge Dooling rendered the opinion we have quoted, contains the following note:

> "*Note:* The U. S. has claimed a preferred status for its mortgage. Examination of the record shows, however, that the mortgage was only endorsed on the ship's register, on July 6, 1921, and that it was not then filed in the proper register, but upon a register showing the United States to be the owner. The U. S. not having complied with the statute, has not a preferred mortgage under Merchant Marine Act, 1920, Section 30."

The court will remember that Judge Dooling's opinion was in no respect based upon the Jones Act.

We agree with libelants, that maritime liens are preferred over common law liens and that a maritime claimant may petition for payment out of the proceeds in the hands of the marshal (Appellees' Reply, p. 16). Our position is simply that, as in *The Moshula,* the court in determining whether it shall award a maritime lien for the penalty provided by R. S. 4529, must consider all the liens, maritime as well as common law liens, in

order to ascertain whether the awarding of a lien for the penalty will have the effect of imposing the penalty upon the party named in the statute as bound to pay it.

IV. The amount of the penalty is computed wrongly.

(Appellants' Brief, p. 46; Appellants' Supplemental Brief, p. 24; Appellees' Reply, pp. 12-13.)

As we have said (Appellants' Supplemental Brief, p. 24) libelants conceded this point in their brief and at the argument. In their reply, however, they now suggest that the matter should have been presented by objections made to the trial judge. Under the rules of this court these objections are not properly a part of the record, and, therefore, were not included in the apostles. That fact is, however, that elaborate objections were made in writing, and that while Judge Dooling was unable to afford counsel the opportunity to explain them, we did advise the representative of libelants' proctor that his computation was erroneous in this respect, and upon his refusal to correct his proposed decree, advised him that we would be compelled to bring the matter to this court.

Second: Libelants should have accepted the transportation offered by Gerber and not recovered money in lieu thereof.

(Appellants' Brief, p. 47; Appellees' Brief, pp. 36-37; Appellants' Supplemental Brief, p. 24.)

The reply contains no discussion of this point.

Third: It was improper to enter a decree for the sale of the vessel under a junior libel without consolidating it with earlier libels and intervening libels, under which the vessel is held by the marshal, and without notice to these libelants and intervening libelants.

(Appellants' Brief, p. 49; Appellees' Brief, pp. 37-39; Appellants' Supplemental Brief, p. 25; Appellees' Reply, p. 13.)

Libelants now reiterate their statement, based entirely on matters outside the record, that they notified Mr. Resleure and Messrs. Goodfellow, Eells, Moore & Orrick. As these gentlemen have no recollection to that effect we can do no more than refer to our supplemental brief on this point.

(Appellants' Supplemental Brief, pp. 25-26.)

The new suggestion is also made that all of these gentlemen are concluded because they failed to appear at the time of the purported proclamation made under the Spencer libel. As we have said, the vessel was in the hands of the marshal at the time the Spencer libel was filed (Appellants' Brief, p. 49); it was impossible for the marshal to seize it again (Appellants' Brief, p. 54) and the purported seizure and proclamation could not possibly furnish a ground of jurisdiction *in rem.* Surely it cannot be the contention of libelants' proctor that the failure of the senior libelant to appear at a proclamation made under a junior libel waives all the claims of the senior libelant. If so, it would seem that the libelants herein have lost all their rights in the "Benowa" because they failed to appear at the proclamation made under the libel of Captain Renny (Appellants' Brief, p. 50; Apostles, pp. 296, 297) although the latter never had a valid maritime lien.

C.

Unrelated Matters.

FIRST: PROVISIONS.

(Appellees' Brief, pp. 2-3, 30-31; Appellants' Supplemental Brief, p. 26.)

As this matter is not discussed, we take it that libelants concede that the whole question of provision is beside the point.

SECOND: DEMANDS UNDER R. S. 530.

(Appellees' Brief, pp. 3-4, 14-16, 39; Appellants' Supplemental Brief, p. 27; Appellees' Reply, p. 17.)

Libelants now concede that the destination of the vessel was changed to San Francisco as late as March 12th (Appellees' Reply, p. 17). While they reiterate their assertion that demands for wages were made by the crew subsequent to that time, they cite nothing in the record to support this assertion, nor do they discuss our statement (Appellants' Supplemental Brief, p. 28), that there is nothing in the record to support it.

In view of the matters discussed in the earlier briefs on file, and of the foregoing, it is respectfully submitted that the decree must be reversed.

Dated, San Francisco,
January 11, 1922.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellants.

OSCAR SUTRO,
FELIX T. SMITH,
Of Counsel.

No. 3749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 6

W. E. GERBER, JR., and ANGLO-CALIFORNIA TRUST COMPANY (a corporation),

Appellants,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD and D. W. DAVIS,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

PILLSBURY, MADISON & SUTRO,
Standard Oil Building, San Francisco,
Proctors for Appellants and Petitioners.

OSCAR SUTRO,
FELIX T. SMITH,
Standard Oil Building, San Francisco,
Of Counsel.

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Appellees.

APPELLANTS' PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

We earnestly believe that the decision of the court in this case is based upon a misapprehension of a fundamental point of fact. We, therefore, respectfully petition for a rehearing of these appeals.

In this court's statement of facts it is said, "Wages calculated to March 15th aggregated $10,395.83". Gerber tendered as wages only $5,609.20, while offering to pay additional sums as costs, transportation, etc. On the assumption of fact made by this court, therefore, this tender was insufficient and the whole first point made in our brief, accordingly, was determined against us.

As a matter of fact, however, it is clear from the record and implied in the interlocutory decree that, while the libel demanded $10,395.83 as wages calculated to March 15th, this was largely in excess of the actual amount of wages due on that date. The interlocutory decree sets forth the total amounts of wages due libelants to March 17th; the aggregate of these amounts is, *not $10,395.83, but $5,551.07,* which is less than the amount of wages tendered by Gerber. Gerber, therefore, tendered more than was actually due in any way, except the penalty claimed by libelants under R. S. 4529. At the time the tender was made, there was respectable authority for Gerber's position that he was not liable for this penalty. There was, therefore, "sufficient cause" for failure to tender the penalty. If Gerber had tendered the additional sums claimed as penalty and libelants had accepted them, he could never have litigated the question of the applicability of the penalty so as to recover these sums from libelants. The only possible way he could have preserved his right to litigate the applicability of the penalty was to follow the course which he adopted.

We respectfully submit, therefore, that our first point (Appellants' Brief, p. 17; Appellants' Supplemental Brief, p. 5; Appellants' Memorandum, p. 8) should have been resolved in our favor, and the authorities therein cited (*Vincent v. United States,* 272 Fed. 889, Appellants' Supplemental Brief, p. 5; Appellants' Memorandum, p. 8, and *Pacific Mail Steamship Company v. Schmidt,* 241 U. S. 245, Appellants' Brief, p. 19; Appellants' Supplemental Brief, p. 6; Appellants' Memorandum, p. 9) should have been followed. As Mr. Justice Holmes said in the latter case:

> "Even on the assumption that the petitioner was wrong it had strong and reasonable ground for believing that the statute ought not to be held to apply. So that the question before us is whether we are to construe the act of Congress as imposing this penalty during a reasonable attempt to secure a revision of doubtful questions of law and fact, although its language is 'neglect * * * without sufficient cause'. The question answers itself. We are not to assume that Congress would attempt to cut off the reasonable assertion of supposed rights by devices that have had to be met by stringent measures when practiced by the States. *Ex parte Young,* 209 U. S. 123."

For these reasons it is respectfully submitted that a rehearing should be granted in this cause.

Dated, San Francisco,
February 23, 1922.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellants and Petitioners.

OSCAR SUTRO,
FELIX T. SMITH,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
February 23, 1922.

FELIX T. SMITH,
Of Counsel for Appellants and Petitioners.

No. 3750

United States

Circuit Court of Appeals

For the Ninth Circuit.

GRECO CANNING COMPANY, a Corporation,
Plaintiff in Error,

vs.

P. PASTENE & COMPANY, INCORPORATED,
a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3750

United States

Circuit Court of Appeals

For the Ninth Circuit.

GRECO CANNING COMPANY, a Corporation,
Plaintiff in Error,

vs.

P. PASTENE & COMPANY, INCORPORATED,
a Corporation,
Defendant in Error.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. THOMAS, BEEDY & LANAGAN, Alaska Commercial Building, San Francisco, Calif.,

Attorneys for Plaintiff.

JOHN L. McNAB, Esq., and C. C. COOLIDGE, Esq., Nevada Bank Building, San Francisco, Calif.,

Attorneys for Defendant.

In the District Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, Second Division.

P. PASTENE & CO., INCORPORATED, a Corporation,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,

Defendant.

(Complaint.)

COMES NOW the plaintiff in the above-entitled action, and for cause of action against the defendant above named alleges:

I.

That the plaintiff P. Pastene & Co., Incorporated, is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, and is a

citizen and resident of the said State of Massachusetts.

II.

That the defendant above named, Greco Canning Co., is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of California, and is a citizen and resident of said State of California, and of the Ninth Judicial Circuit, Northern District of California. [1*]

III.

That on or about the 13th day of May, 1916, the defendant above named made, executed and delivered to the plaintiff above named a contract, a true copy of which is annexed hereto and marked Exhibit "A."

IV.

That thereafter by agreement between the parties hereto, the contract hereinabove referred to, a true copy of which is attached hereto and marked Exhibit "A" was changed so that the defendant agreed to deliver 3,000 cases of Salsa De Pomidoro packed 200 tins to the case of six ounces each in wooden cases at $3.50 per 100 tins, instead of 2,000 cases of Salsa De Pomidoro packed 200 tins to the case of six ounces each in wooden cases at $3.50 per 100 tins, and 2,000 cases of Salsa De Pomidoro packed 100 tins to the case, six ounces each in fiber cases at $3.50 per hundred tins.

V.

That thereafter and on or about the 2d day of

*Page-number appearing at foot of page of original certified Transcript of Record.

November, 1916, the defendant above named delivered to the plaintiff above named f. o. b. cars at San Francisco, California, 665 cases of Salsa De Pomidoro, 200 tins to the case of six ounces each in wooden cases. That the plaintiff has demanded the delivery of the remainder of the goods so contracted to be delivered to it, but defendant has failed, neglected and refused to deliver the same, or any part thereof.

VI.

That on the 1st day of December, 1916, and prior thereto, and ever since then, plaintiff has been able and ready and willing to pay for the goods upon delivery.

VII.

That the plaintiff has duly performed all the [2] conditions of the contract on its part to be performed.

VIII.

That on account of the failure, neglect and refusal of the said defendant to deliver to the plaintiff 2,335 cases of Salsa De Pomidoro packed 200 tins to the case of six ounces each in wooden cases at $3.50 per hundred tins, plaintiff has been damaged in the sum of $23,350.00.

WHEREFORE, plaintiff prays judgment against the said defendant in the sum of $23,350.00, together with its costs of suit herein expended.

THOMAS, BEEDY & LANAGAN,
Attorneys for Plaintiff. [3]

Exhibit "A."

THE CRECO CANNING CO., of San Jose, California, hereinafter called seller, this day sold, and P. Pastene & Co., New York City, N. Y., hereinafter called buyer, this day bought the following described goods—1916 pack:

(2000) Two thousand cases Salsa De Pomidoro packed 200 tins
(2000) " " " " " " " 100 "

to the case six oz. each, in wooden cases at Three Dollars and
" " " " " " " fiber " " " " "

Fifty cents ($3.50) per hundred tins.
" " " " " "

TERMS: The above-named goods are f. o. b. cars San Francisco less 1½% cash discount, Sight Draft Bill of Lading attached.

GUARANTEE: Buyers guarantee full acceptance unless this contract is otherwise changed by mutual consent of both seller and buyer. Seller guarantees that the goods covered by this contract are not adulterated, mislabeled, or misbranded within the meaning of the National Food and Drug Act, June 30, 1906: or the California Pure Food Act, March 11, 1907. Seller is relieved from any responsibility for misbranding when goods are not shipped under sellers label. Quality to be of same consistency as the Imported, of good flavor and color. Samples for approval to be submitted prior to shipping and shipment to correspond with samples.

CONDITIONS: Goods at risk of buyer from and after shipment, although shipped to seller's order. In case of short pack, seller agrees to make prorate delivery only. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire, or other circumstances, beyond its control, such obligations shall at once terminate and [4] cease. Usual swell guarantee—viz—Seller guarantees swells not to exceed ½ of 1%.

Shipment to be made as soon as practical after packing. All goods remaining unshipped to be billed and paid for not later than November 1, 1916. Buyer agrees to protect draft against documents for invoice value on presentation. Seller agrees to store said goods and insure them at buyers expense, should buyer so desire, until December 1, 1916.

Seller: GRECO CANNING CO.
By V. V. GRECO,
Sec. and Treas.

Buyer: P. PASTENE & CO.,
By CHAS. A. PASTENE,
Pres.

Sweet Basil or Basilico.

One leaf of fresh Basil to be put in each tin, either on top or bottom of contents. [5]

United States of America,
Northern District of California,
State of California,
City and County of San Francisco,—ss.

Peter R. Pastene, being duly sworn, deposes and says: That he is an officer, to wit, the treasurer of P. Pastene & Co., Inc., a corporation, plaintiff in

the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

PETER R. PASTENE.

Subscribed and sworn to before me this 22d day of May A. D. 1917.

[Seal] ANNE F. HASTY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 22, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [6]

In the District Court of the United States in and for *the Judicial* Circuit, Northern District of California, Second Division.

No. 16,076.

P. PASTENE & CO., INCORPORATED, a Corporation,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,

Defendant.

Demurrer.

Now comes the defendant and files this, its demurrer to the complaint of plaintiff on file herein, and demurs on the following grounds, to wit:

I.

That said complaint does not state facts sufficient to constitute a cause of action against the defendant.

II.

That said complaint is uncertain in the following particulars:

A. It appears from Exhibit "A" attached to and made a part of the complaint, that in case of a short pack, the seller agrees to make only a prorate delivery and it cannot be ascertained from the face of the complaint whether there was in fact a short pack or whether there was a prorate delivery only, in accordance with the terms of the contract; nor can it be [7] ascertained whether in fact there was a violation of the provisions of the contract or a compliance therewith.

B. It appears from the contract, Exhibit "A" made a part of the complaint, that if the seller should be unable to perform all its obligations under said contract by reason of strike, fire or other circumstances beyond its control, the obligations of the contract should cease and it cannot be ascertained from the complaint whether as a matter of fact the alleged failure of the defendant to deliver the goods called for by the contract was due to the excepted reasons in said contract, namely: to strike, fire or other circumstances beyond its control.

C. It is alleged in paragraph IV of the complaint that thereafter the agreement between the parties hereto, namely, the written contract attached to the complaint, was changed so that the defendant agreed to deliver 3,000 cases instead of 2,000 and

other changes were made, in accordance with Paragraph IV of the complaint, but it cannot be ascertained from the complaint how or in what manner the said changes were made and whether by oral agreement or by written contract, and if by written contract what other provisions were contained in said contract, and whether as a matter of fact the part performance alleged by the plaintiff was on the contract as changed or in its original form, or whether deliveries were made on the contract as amended, and if so how said amendment was made or executed and whether the changes alleged in paragraph IV of the complaint were the sole and only changes made in said contract and whether as a matter of fact the contract, added as Exhibit "A," contains the only duly executed contract between the parties. [8]

III.

Said complaint is ambiguous for the reasons set forth in paragraph II of this demurrer.

IV.

Said complaint is unintelligible, for the reasons set forth in paragraph II of this demurrer.

WHEREFORE defendant prays that this demurrer be sustained and that he be not required to answer the complaint.

J. L. McNAB,
Attorney for Defendant.

Dated July 5th, 1917.

I hereby certify that I am attorney for the defendant named in the foregoing action and named in the demurrer. That this demurrer is not filed for the

purpose of delay and that in my opinion it is well taken in point of law.

J. L. McNAB,
Attorney for Defendant.

[Endorsed]: Filed July 5th, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [9]

At a stated term, to wit, the July Term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 9th day of July, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,076.

P. PASTENE & CO.

vs.

GRECO CANNING CO.

Minutes of Court—July 9, 1917—Order Overruling Demurrer.

Defendant's demurrer to the complaint came on to be heard and no one appearing on behalf of the defendant, it was ordered that said demurrer be, and the same is hereby, overruled. [10]

In the District Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, Second Division.

No. 16,076.

P. PASTENE & CO., INCORPORATED, a Corporation,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,

Defendant.

Answer.

Comes now the defendant in the above-entitled action and answering the complaint of plaintiff on file herein:

Admits that the contract made and entered into between plaintiff and defendant is as set forth in the Exhibit "A" annexed to plaintiff's complaint, save and except in this:

Said contract was not made on the 13th day of May, 1916, but was made and is dated at San Jose, California, April 28, 1916.

Admits that the contract alleged in plaintiff's complaint (and which was dated April 28, 1916, instead of May 13, 1916, as alleged in plaintiff's complaint) was changed so that the defendant agreed to deliver 3,000 cases of Salsa De Pomidoro, packed 200 tins to the case of 6 ounces each, in wooden cases at $3.50 per hundred tins, instead of delivering 2,000 cases of Salsa De Pomidoro packed 200 tins to the case of

6 ounces each in wooden cases at $3.50 per hundred tins, and 2,000 cases of [11] Salsa De Pomidoro packed 100 tins to the case, 6 ounces each in fiber cases at $3.50 per hundred tins. Defendant alleges that said change was made for the plaintiff's convenience and was merely an alteration in the packing, the quality and quantity of content sold being the same as that provided in the contract; and defendant alleges that except as so modified said contract remained in all respects exactly as written between the parties thereto.

Admits that the plaintiff demanded the delivery of the remainder of the goods so contracted to be delivered to it and admits that the defendant did not deliver to the plaintiff more than 665 cases of Salsa De Pomidoro, 200 tins to the case of 6 ounces each in wooden cases, and defendant denies that it either failed, neglected or refused to deliver the same or any part thereof, save as specifically admitted herein, namely:

The defendant admits that it was unable to deliver more than 665 cases for the reason that there was during the year 1917 a short pack, and it was specifically provided in the contract between the plaintiff and defendant that in case of a short pack the seller (defendant) agreed to make a prorate delivery only. Defendant was further unable to deliver the whose of said product for the reason that there were other circumstances beyond the defendant's control preventing such delivery; that is to say, owing to severe climatic conditions, there was a failure of the tomato crop from which said Salsa De Pomidoro is pro-

duced and there were not sufficient tomatoes produced or which could be secured to supply the amount needed in said contract and the defendant alleges that it was and is provided in the contract between the plaintiff and defendant that if the seller (defendant) should be unable to perform all of its obligations under said contract, by reason of any circumstances [12] beyond its control, such obligation should at once terminate and cease. Defendant alleges that it complied with its contract in all respects, as limited by the provisions thereof, and there being a short pack the defendant, pursuant to the provisions of said contract, made a prorate delivery (and in excess of a prorate delivery) to the plaintiff and owing to the circumstances beyond defendant's control, to wit, the crop failure, defendant made a prorate delivery, but its obligations to deliver beyond said prorate delivery, terminated and ceased under the provisions of said contract. And defendant alleged that on delivering to the plaintiff its prorate delivery of said pack of 1917 the defendant notified the plaintiff of the reason for inability to deliver further under said contract and that it had complied with its contract, as hereinbefore alleged.

Defendant has no information sufficient to enable it to answer all of the allegations set forth in paragraph VI of plaintiff's complaint, and basing its answer on said ground defendant denies that on the 1st day of December, 1916, or prior thereto or ever since said date or at any time plaintiff has been able, ready or willing to pay for the goods on delivery or any other time.

Denies that on account of the failure, neglect and refusal or the failure, neglect or refusal of the said defendant to deliver to the plaintiff 2,335 cases of Salso De Pomidoro either packed in 200 tins to the case of 6 ounces each in wooden cases at $3.50 per hundred tins, or any other quantity of Salso De Pomidoro, packed in any manner whatsoever, or for any other reason whatsoever, the plaintiff has been damaged in the sum of $23,350.00 or any other sum whatsoever.

Denies that the plaintiff has suffered any damage whatsoever [13] on account of any act or omission by or on the part of this defendant either relating to the contract set forth in plaintiff's complaint or arising from any other fact, act or omission whatsoever.

And for a second, separate and further defense to plaintiff's complaint, defendant alleges:

That the contract entered into between the plaintiff and defendant contains the following clause:

> "In case of a short pack seller agrees to make prorate delivery only."

That there was a short pack for the year 1917, within the meaning of said contract: and there was not sufficient crop to furnish other than a short pack; and pursuant to the provisions of said contract, hereinbefore set forth, the defendant made to the plaintiff a prorate delivery of the pack of Salsa De Pomidoro produced by said defendant, and delivered in excess of a prorate delivery, owing to the inability to compute accurately, in advance, what would be an exact prorate delivery. That plaintiff

received under the provisions of the contract between plaintiff and defendant, in excess of its full prorate delivery as called for by said contract.

And for a third, further and separate defense to plaintiff's complaint, defendant alleges:

That the contract entered into between plaintiff and defendant contained the following clause:

> "If seller should be unable to perform all its obligations [14] under this contract, by reason of a strike, fire or other circumstances beyond its control, such obligations shall at once terminate and cease."

That severe climatic conditions during the season of 1917 caused a shortage and failure in the tomato crop and Salsa De Pomidoro is a product made from tomatoes; that such tomato crop shortage was a circumstance beyond defendant's control and defendant was unable to secure or procure tomatoes sufficient to fill its contracts and made prorate delivery to the extent of the tomato crop capable of being rendered into said Salsa De Pomidoro; that by virtue of said provision of said contract the obligations on the part of the defendant to furnish other than the prorate delivery terminated and ceased, and defendant was under no obligation to proceed beyond the said terms of said contract.

The defendant on delivering to plaintiff its prorate delivery notified the plaintiff of the circumstances and reason for inability to deliver further.

WHEREFORE defendant prays that plaintiff take nothing by this action; that it be adjudged and decreed that defendant has fully and completely

complied with the provisions of its contract and was not in default with regard to the delivery beyond the actual delivery so made by it; that plaintiff's action be dismissed and that the defendant have a dismissal in its favor together with its costs of action herein and for such other and further relief as shall be proper in the premises.

JOHN L. McNAB,

_____,

Attorneys for Defendant. [15]

United States of America,
Northern District of California,
State of California,
County of Santa Clara,—ss.

V. V. Greco, being first duly sworn, deposes and says: That he is an officer of the defendant corporation, to wit, the secretary thereof; that he has read the above and foregoing answer to plaintiff's complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein set forth on information or belief, and that as to those matters he believes it to be true.

V. V. GRECO.

Subscribed and sworn to before me this 23d day of August, 1917.

[Seal] E. K. GARLIEPP,
Notary Public in and for the County of Santa Clara, State of California.

Receipt of a copy of within answer is hereby admitted this 25th day of August, 1917.

THOMAS, BEEDY & LANAGAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 5, 1917. W. B. Maling, Clerk. By J. A. Schaerter, Deputy Clerk. [16]

In the District Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, Second Division.

No. 16,076.

P. PASTENE & CO., INCORPORATED, a Corporation,

Plaintiff,

vs.

GRECO CANNING COMPANY, a Corporation,

Defendant.

(Stipulation and Order Waiving Jury and Placing Cause on Calendar).

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the above-entitled action may be placed on the term calendar of the above-entitled court for the term commencing the first Monday in March, 1919, and further, that a jury be and it is hereby waived on the trial of the above-entitled action.

Dated: February 27th, 1919.

THOMAS, BEEDY & LANAGAN,
Attorneys for Plaintiff.
JOHN L. McNAB,
Attorneys for Defendant.

So ordered.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Feb. 27, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

At a stated term, to wit, the July Term, A. D. 1920, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Saturday, the 30th day of August, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,076.

P. PASTENE & CO., INC.

vs.

GRECO CANNING CO.

Minutes of Court—August 30, 1920—Order for Judgment in Favor of Plaintiff.

This cause heretofore tried and submitted being fully considered and the Court having filed its opinion, it is ordered that judgment be entered in favor of plaintiff and against defendant in the sum of $5205.00 and for costs. [18]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,076.

P. PASTENE & CO., INCORPORATED, a Corporation,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,

Defendant.

Judgment.

This cause having come on regularly for trial upon the 16th day of December, 1919, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed, James Lanagan, Esq., appearing as attorney for plaintiff and John L. McNab and C. C. Coolidge, Esqrs., appearing as attorneys for defendant; and the trial having been proceeded with on the 17th, 23d and 30th days of December, 1919, and oral and documentary evidence having been introduced on behalf of the respective parties, and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having filed its opinion and ordered that judgment be entered in favor of plaintiff and against defendant in the sum of $5,205.00 and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the

Court that P. Pastene & Co., Incorporated, a corporation, plaintiff, do have and recover of and from Greco Canning Co., a corporation, defendant, the sum of Five Thousand Two Hundred Five and 00/100 ($5,205.00) Dollars, together with its costs herein expended taxed at $224.70.

Judgment entered August 30, 1920.

WALTER B. MALING,
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk. [19]

[Endorsed]: Filed Aug. 30, 1920. Walter B. Maling, Clerk. [20]

(Title of Court and Cause.)

(Opinion).

Filed August 30, 1920.

THOMAS, BEEDY & LANAGAN, of San Francisco, Attorneys for Plaintiff.

JOHN L. McNAB, of San Francisco, Attorney for Defendant.

VAN FLEET, District Judge.

Action to recover for breach of contract to manufacture and deliver three thousand (3,000) cases of Salsa De Pomidoro, or Italian tomato paste, in the crop season of 1916.

There was delivery under the contract of but six hundred and sixty-five (665) cases or about twenty-

two per cent (22%) of the quantity contracted for, and the action proceeds upon the theory that the plaintiff is entitled to recover upon the basis of a full and complete delivery of the quantity contracted for.

The defense is based on this provision of the contract; "In case of short pack, seller agrees to make prorate delivery. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire or other circumstances beyond its control, such obligations shall at once terminate and cease." The defendant's claim is, in substance, that there was a "short pack" within the meaning of the contract, resulting partly from a very considerable failure in the tomato crop by reason of weather conditions, and partly from trouble with defendant's processing appliances which caused great delay and difficulty; that by reason of these conditions defendant was compelled to make a [21] prorate delivery; that plaintiff received its full *pro rata* of the pack actually made, which was all it was entitled to. The different elements of this defense will be considered.

1. As to a failure of the crop, it is sufficient to say that the evidence, which is more or less conflicting, is not sufficient to sustain that feature of the defense—at least to any such extent as that claimed. There was evidence tending to show that early rains and frosts damaged the crop to some extent and thus decreased production, particularly in the Santa Clara Valley, the territory more immediately surrounding defendant's plant, but it was

not only very indefinite as to the real extent of the injury in that valley but wholly so as to the effect in other fields of production in adjacent counties where it appeared the tomato is largely grown; and there being nothing in the terms of the contract requiring that the goods contracted for be produced from tomatoes grown in any particular section, it was essential to sustain this defense, even had there been a more complete failure in the immediate field, to show that the fruit could not have been secured in other parts of the State in quantity to fulfill the contract. Newall et al. vs. New Holstein Canning Co., 97 N. W. 487. The evidence discloses no such effort in this respect as would establish inability to get the fruit elsewhere or to excuse the failure to perform the contract to the great extent shown. To the contrary, I am satisfied that taking all the evidence into consideration and giving the defendant the benefit of every intendment and deduction making in its favor as to failure or damage to the crop, the Court would be wholly unwarranted in finding the defendant justified in abating more than twenty per cent (20%) from a full delivery under its contract. [22]

2. As to the delay and difficulty encountered by defendant from trouble with its paste making machinery, it is not and indeed could not well be seriously claimed that such a cause would ordinarily come within the definition of a "circumstance beyond its control" which would excuse performance by defendant within the terms of the contract. Carnegie Steel Co. vs. United States, 240 U. S. 156;

Morgan Lyall, 16 Quebec K. B. 562; Connorsville Wagon Co. vs. McFarlan Carriage Co., 166 Ind. 123; American Bridge Co. vs. Glenmore Distilleries Co., 107 S. W. 279; Vredenburgh vs. Baton Rouge Sugar Co., 28 Southern, 122. But the claim under this head is, first, that the custom in the packing business is to recognize such causes of delay as justifying a "short pack," and, second, that independently of this custom the parties themselves put that construction upon the contract and that the Court is bound thereby. But the evidence on the subject is too vague, unsatisfactory and conflicting to enable the Court to find the existence of any such custom. It tends strongly, to the contrary, to indicate that nothing is ordinarily regarded by the trade as justifying a "short pack" other than causes beyond the control of the packer such as those stipulated in the contract or of a kindred character. Nor do I think the evidence sustains the contention that the parties in their dealings have given the contract any such construction as that contended for. This claim is based solely upon certain passages occurring in the correspondence carried on during the time the goods were being processed. Quite early in the packing season the defendant wrote plaintiff of difficulties being encountered with the processing machinery which were causing delay and that by reason of that and because "the crop this year is very short as we [23] have had considerable rain which has caused much damage," it was predicted that the pack would be as low as twenty-five per cent (25%). In answer the plaintiff wrote express-

ing regret over the difficulties being encountered and disappointment at the prospect of a "short pack" and, expressing the hope that defendant would find conditions improving, said: "At this time we will only state that if you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you. It is obvious, naturally, of course, that in any case we shall expect a full *pro rata* delivery of all such goods as you are successful in producing."

There were later references in the correspondence to the same subject but none bearing more definitely on the question of a practical construction of the contract than those given. It is quite obvious that there was nothing in the suggestions made by plaintiff in reply to a recital by defendant of the difficulties encountered which could be seized upon as tending to show that plaintiff was giving the contract a construction in any respect differing from that its language would import. The defendant had mentioned to plaintiff, as one of the difficulties presenting itself, a short crop resulting from weather conditions, a thing which plaintiff would at once recognize as justifying or excusing a "short pack" under the very terms of the contract. The answer must be read, as does his next letter in which he makes reference to hearing that weather conditions had improved, as indicating that damage to the crop was what he had in mind in his suggestion about meeting defendant's situation "in reasonable

fashion." Very clearly it cannot be construed as an acquiescence in any suggestion which may [24] be gathered from defendant's letters that the latter was relying on the trouble with its machinery as justifying a "short pack."

In construing acts or expressions of the kind relied on as constituting a construction by the parties of a written contract at variance with the ordinary import of its terms, it is a cardinal rule that "It ought to appear with reasonable certainty that they were acts of both parties done with knowledge and in view of a purpose at least consistent with that to which they are now sought to be applied." Sternbergh vs. Brock, 225 Pa. 279, 287. Here the only information plaintiff had as to conditions confronting the defendant was what those conditions were represented to be by the latter and as to which, as we have seen, the failure of the crop was at least exaggerated. In this respect, therefore, the plaintiff is entitled to rely on the terms of the contract as written.

The further considerations urged by counsel as to the construction to be put upon the contract have not been overlooked but are regarded as inapplicable to its express terms.

The contract price, delivered by defendant f. o. b. cars San Francisco, was Seven Dollars ($7.00) per case, and it is stipulated that the market price at the time and place of delivery was Ten Dollars ($10.00) a case. In view of the foregoing considerations, plaintiff should have judgment in accord with those figures based upon a delivery of eighty

per cent (80%) of the quantity contracted for, less the quantity already delivered, and for its costs.

Judgment may be entered accordingly.

[Endorsed]: Filed August 30, 1920. Walter B. Maling, Clerk. [25]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

Before Honorable WM. C. VAN FLEET, Judge.

No. 16,076.

P. PASTENE & CO., Incorporated, a Corporation, Plaintiff,

vs.

GRECO CANNING CO., a Corporation, Defendant.

Statement of Evidence in Form of a Bill of Exceptions.

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In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

Before Honorable WM. C. VAN FLEET, Judge.

No. 16,076.

P. PASTENE & CO., INCORPORATED, a Corporation,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,

Defendant.

STATEMENT OF EVIDENCE IN FORM OF BILL OF EXCEPTIONS.

BE IT REMEMBERED that the above-entitled action came on for trial before the above-entitled court, Honorable William C. Van Fleet, Judge thereof, on the 16th day of December, 1919, James Lannigan, Esq., appearing as counsel for the plaintiff, and John L. McNab, Esq., and C. C. Coolidge, Esq., appearing as counsel for the defendant.

Prior to any evidence being taken in the case it was stipulated between counsel that the market price of the tomato paste involved in the action at the time and place of delivery was $10 per case.

Thereupon counsel for the plaintiff, having stated that the answer admitted a failure to deliver and having pleaded as a defense: First, that there was a short pack; secondly, that the 665 cases delivered by the defendant to the plaintiff represented the prorate that the plaintiff was entitled to; and, third, that [27—1] circumstances beyond the control of

the defendant made it impossible to make a larger delivery, and the market price having been made the subject of stipulation, the plaintiff rested his case.

Thereupon Mr. McNab, counsel for the defendants, stated the following in the form of an opening statement: That the evidence will show that the product known as Salsa De Pomidoro is a highly concentrated extract of the tomato and that prior to 1916 it was not known as a domestic product within the United States; that it had prior to that time been exclusively imported from Italy, and that during the war an embargo was placed upon its importation from Italy, and that therefore there was a derth of the product here. That the plaintiff Pastene came to California, and the defendant Greco, president of the Greco Canning Company, entered into the contract in question after Mr. Pastene had visited the defendant's plant and discussed the matter with him. That it was necessary in order to produce this product that machinery should be installed for that purpose. The Greco Plant, the evidence will show, up to that time had been engaged in the manufacture of canned tomatoes and tomato sauce as their exclusive products. That this company then added this Salsa De Pomidoro as a side line. That the defendant immediately procured the only machinery manufactured in the United States for the purpose of producing this product, that is, the only standard machinery, and put it in with competent and capable engineers, and commenced the manufacture of all three products. That the defendant

operated this machinery to the limit of its capacity, it being machinery that was supposed to be capable of producing the entire quantity called for by his contracts. That the machinery failed to operate continuously; that it would choke owing to the fact [28—2] that it was new machinery and never theretofore used; that it was operated by capable engineers continuously night and day during the entire season; and that working night and day with capable engineers they did produce a certain quantity of this product. That various contracts had been entered into by the defendant to distribute this product; and that when the season was concluded and the frost came on that destroyed the rest of the crop, making it impossible to proceed further, the defendant distributed the product *pro rata.*

The evidence will show that early in the season, before they thought there would be a short pack, they distributed two small quantities, only twenty or forty cases, somewhere in excess of the percentage. We will show that the percentage or prorate, as we contend under the decisions a prorate means, would have amounted to nineteen and a fraction per cent to the various contract purchasers. And we will show that we did actually deliver to the plaintiff in this case, who held the largest order, some twenty-two and a fraction per cent of the entire contract.

We will show likewise that there was a shortage of crops and short pack, owing to the fact that before they could conclude the operations of the season a heavy frost came on and destroyed it. And we

will show that throughout the defendant endeavored in every way to comply with the contract and that the defendant did comply with the contract by giving not only what the plaintiff was entitled to in the way of his percentage, but more, because it could not be foreseen early in the season just exactly what prorate would be distributed.

Thereupon, after some discussion between counsel and the Court with respect to the law applicable to the case, defendant proceeded with his case as follows: [29—3]

Testimony of Victor V. Greco, for Defendant.

VICTOR V. GRECO, being duly called and sworn as a witness, testified as follows:

I am the president of the defendant Greco Canning Company. It operates its cannery and plant at San Jose, California, for fruits and vegetables. Prior to 1916 it had produced canned tomatoes. I am president and manager. They canned tomatoes as peeled tomatoes and sauce. I am the Greco whose name is signed to the contract sued on in this case. I personally met Mr. Pastene, manager of the Pastene Company. He visited my plant prior to signing the contract. We went through the plant together. At the time of signing the contract or prior to signing the contract he had gone entirely through my plant. Prior to 1916 I had not produced any such product known as Salsa De Pomidoro. Salsa De Pomidoro is a highly concentrated tomato. Prior to 1916 it had not been a domestic product in the United States of America, but had

(Testimony of Victor V. Greco.)

been imported from Italy. It is a substitute for tomatoes used principally by Italians in the making of sauces, gravies and soups. Prior to 1916 we had not produced such a product commercially, nor had it been produced commercially to my knowledge anywhere in the United States. The war was responsible for the commencement of the product in 1916 by the trade. There was an embargo placed on the exportation of that product by Italy, and therefore none came to America. This was the subject of discussion between Pastene and myself before the contract was signed. After signing the contract I too steps to fulfill it. I contracted for the necessary equipment and machinery, and apparatus for the manufacture of this product. During the year 1916 the peeled tomato and hot sauce departments of our canning plant were operated during the day time, while the Salsa De Pomidoro department was operated day and night. We would have made more profit [30—4] out of the Salsa De Pomidoro. It was to our interest to run the Salsa De Pomidoro plant at full capacity. We ran it to the fullest capacity that we possibly could. In other words, while running it, we had considerable interruptions, and, therefore, the capacity was reduced, owing to those interruptions.

We procured this machinery from the Oscar Krenz Manufacturing Company. I do not know of any other firm in America engaged in the manufacture of such machinery. The fact that we would require to install machinery for the purpose of manufactur-

(Testimony of Victor V. Greco.)

ing this product, this special product, was discussed between Mr. Pastene and myself. The capacity of the machinery was figured out during a season of about two months that we should have produced about 30,000 cases. 30,000 cases would have more than supplied the contracts we had signed. The total amount which we had contracted to deliver to our various customers was 18,930. These were future contracts; and the total capacity of the machinery which we had purchased for the purpose of delivering that was 30,000 cases for the season. We had a margin of something like 12,000 cases to go on.

The actual quantity produced by us by running night and day with our machinery was 3,445 cases. Prorating our deliveries, the percentage which we were bound to deliver to each one of those customers was 18.2 per cent. We actually delivered 665 cases to the plaintiff out of 3,445 cases produced by us for the year. The percentage of the pack that we actually delivered to the plaintiff was 22.2 per cent. Yesterday, as suggested by my counsel, I handed the attorney for the other side a list of the contracts and deliveries.

Thereupon the following proceedings took place:

"Mr. McNAB.—Q. I ask you whether you hold in your hand a [31—5] tabulation made from your books containing, first, the names of all the customers with whom you had made contracts; secondly, the quantity contracted for to each; third, the quantity actually delivered to each; fourth, the prorate or percentage of delivery to each, and, fifth,

(Testimony of Victor V. Greco.)

the price of each contract? Have you prepared such a statement? A. I have.

Q. Do you know it personally to be a correct statement? A. I do."

"Mr. McNAB.—Q. You say that you actually delivered to Pastene & Co. 22.2 per cent?

A. Yes.

Q. How did the other orders vary? What percentage did they run?

A. Uddo Bros. & Co., quantity contracted for, 5,000 cases, quantity delivered 950 cases, percentage of delivery, 19 per cent; price sold, $6.75 per case."

Thereupon the document referred to by the witness was received in evidence and marked Defendant's Exhibit "A," and is as follows:

Defendant's Exhibit "A."

"LIST OF CONTRACTS AND DELIVERIES OF SALSA DE POMIDORO ON 1916 PACK IN CASES.

Names.	Quantity Contracted.	Quantity Delivered.	Percentage of Delivery.	Price.
Uddo Bros. & Co.....	5000	950	19	6.75
J. W. McNience.....	3000	500	16.7	7.00
Ignatious Gross	2000	308	15.4	7.00
Schmidt & Ziegler.....	200	100	50	6.80
B. Karp	1000	154	15.4	7.50
Jos. Caruso	100	20	20	7.50
H. Ettinger	1000	154	15.4	7.50
J. A. Kirsch & Co.....	1000	154	15.4	7.50
M. Rosen	1000	154	15.4	7.50
S. Herekoritz	1000	154	15.4	7.50
Harry Hyman	20	10	50	7.50
C. Bellanca	500	100	20	7.50
A. B. Caberac	10	5	50	8.50
P. Pastine & Co.....	3000	665	22.2	7.50
John S. Sills Co.....	100	15	15	7.50
T. Sanfilippo	No contract	2		12.00
	18930	3445	18.2%	[32—6]

(Testimony of Victor V. Greco.)

"The COURT.—I want to know what the occasion was of this small production of this machinery that you say had a capacity of 30,000 cases. What were those interruptions?

Mr. McNAB.—Now state, first of all, the conditions with regard to the crop. Was there or was there not a sufficient quantity of tomatoes?

The COURT.—Why don't you let him state about these interruptions from this machinery? That is what I want. If it comes in logically I remember it a great deal better, and I like to remember the evidence.

Mr. McNAB.—Q. Mr. Greco, state fully to the Court just the exact facts with regard to this machinery, and what interruptions, if any, occurred thereto.

The COURT.—You said there were a great many interruptions.

A. Yes, the machinery for the manufacture of Salsa De Pomidoro consists, first, of certain machinery for the washing, crushing and pulping of these tomatoes.

The COURT.—This is understood as going in under your objection, Mr. Lannigan.

Mr. LANNIGAN.—Yes.

A. From there it went up to our factory room, where the concentration was to take place, and we had two vacuum plants with a capacity of 30,000 cases a season; the season consists of about ten weeks, that is, the tomato season. We found that in operating this apparatus, to get out the quality

(Testimony of Victor V. Greco.)

that we had intended to deliver, that is, a highly concentrated stuff, that the product would burn, would clog up the tubes of these pans; the pans were about from 700 to 750 gallons capacity each, and there were numerous tubes, several hundred tubes in each pan; the vacuum did not succeed in keeping the product in motion, this heavy concentrated [33—7] stuff, caused it to clog up in these tubes, and that it would burn and stick, and we had to get drills, electric drills, and drill it out, and in some cases it would take us a whole day to do it; at some times it was burned so hard, at one particular time it took us five days and five nights, changing shifts day and night, with the men working inside of these pans to clean out these tubes.

Q. Was that a defect in the machinery, or some defect in the nature of the stuff that was put through it?

A. I would say it was a defect in the machinery to this extent, your Honor, that we have overcome that of late years by having installed in this machinery, in this apparatus, larger tubes; to get additional steam surface, to get more tubes in the pan, to get additional steam surface, the manufacturer of this apparatus figured that a certain size tube was sufficient, but the fact was with the highly concentrated stuff the tube was too small, would not keep the stuff in circulation. We overcame this in following years, by enlarging the size of these tubes, by putting in larger tubes; we, however, de-

(Testimony of Victor V. Greco.)

creased the capacity of the machine, because we had less steam surface."

These interruptions were very frequent. I do not recall that we were able to run one day without interruptions of that kind. The machinery was installed by the Oscar Krenz Manufacturing Company, the people with whom we contracted for the purchase of the machinery. The Krenz people had their own men down there operating the machinery for some time, to show our men or the man who was in charge, how to operate this machinery, it being something entirely new, and we had a man down there, I don't recall his name at the present time, but an engineer who was in charge. We also had a consulting engineer, Mr. Davis, who at that time was engineer for the San Jose Ice & Cold Storage Company, and following that season [34—8] I employed Mr. Davis, who is now superintendent of our plant. These people of whom I have been speaking are engineers by trade and training. There was no period of the day or night during the year 1916 during the packing season, that we were not continuously operating the Sala De Pomidoro machinery.

Q. Now, was the fact that there was no machinery in the United States or machinery other than that purchased from the Krenz Company—was that discussed between you and Mr. Pastene, prior to entering into this contract?

Mr. LANNIGAN.—That is objected to as imma-

(Testimony of Victor V. Greco.)

terial, irrelevant and incompetent, and not addressed to any issue in this case.

The COURT.—I will let it go in, subject to the objection.

A. It was discussed with Mr. Pastene, that this kind of machinery, the vacuum machinery, was the kind of machinery produced the best quality or grade.

Thereupon the following took place:

Q. Was the fact that Salsa De Pomidoro had never been produced in the United States, and that it was in its experimental stage in any way discussed between you and Mr. Pastene?

Mr. LANNIGAN.—The same objection.

A. Yes, it was.

The COURT.—I do not think that is within the defense of incapacity of the machinery, and it certainly is not within either of the other defenses set up, that is, matters over which one has no control. Of course, the latter would be on the assumption that one entering into a contract was capable of fulfilling it under any ordinary conditions. I will sustain the objection to that.

Mr. McNAB.—We will take an exception.

Which exception the defendant hereby specifies as

DEFENDANT'S EXCEPTION No. 1. [35—9]

The witness proceeding:

The engineers, the people who furnished the machinery, stated that they had figured out that these two apparatuses would produce, during the season

(Testimony of Victor V. Greco.)

of about ten weeks not less than 30,000 cases of the product. There was absolutely nothing within my knowledge that was left undone in order to make this product successful. Coming down to the crop in question: We did not produce a full pack in 1916. During the operating season of 1916 the tomatoes were affected by the water. There were insufficient tomatoes for me to procure a full pack. The reasons were climatic, normal, early rains and early frosts. With relation to the end of the packing season those rains and frosts occurred much earlier than normal. My recollection is that almost two weeks earlier than normal.

Thereupon the following took place:

"Q. What was the effect of these early rains and frosts on the Santa Clara Valley tomato crop?

Mr. LANNIGAN.—I object to that on the ground it is incompetent and irrelevant in this, that we are not to be confined to the Santa Clara Valley tomato crop. The Court can take judicial knowledge of the fact that tomatoes are produced in various other places in California.

The COURT.—Yes, it would not necessarily be confined to the State, because there is no limitation in this contract that they would be manufactured from the product grown in this State or grown in any particular community."

The witness proceeding:

Prior to commencing our operations in 1916, we had taken steps to procure a sufficient tonnage of tomatoes for our product—a sufficient amount to

(Testimony of Victor V. Greco.)

produce the entire quantity which [36—10] we had contracted for. We actually made contracts for a tomato acreage sufficient to enable our plant to run and supply our entire contracts. It was our custom to buy in the immediate vicinity, so as to get best results, get better quality of raw material, and get it to our canning plant fresh, so our contracts were mostly entered into in the Santa Clara Valley. We never aimed to buy outside at any great distance. In doing that we were following the usual custom of our plant. I positively know of my own knowledge that our contracts were over a sufficient acreage necessary to supply our entire contracts. Had the weather conditions not interfered at the time to which I have just testified, we would have been able normally to proceed and purchase a very much larger quantity.

Mr. McNAB.—Q. Go right ahead and state fairly and frankly to the Court just what you would have been able to do had the weather conditions not interfered?

The COURT.—What I wanted to know is what these conditions were, how they affected that particular season. What were the climatic conditions, and how did they affect the tomato crop?

A. A rain during the peak of the season has the effect of stopping maturing of tomatoes and rotting those on the vines already matured.

WITNESS.—(Continuing.) I was going to proceed, a rain is usually followed, then, by a heavy frost, and an early frost stops any further develop-

(Testimony of Victor V. Greco.)

ment or ripening of those tomatoes, so the quantity of tomatoes is considerably reduced by a rain and frost.

Mr. McNAB.—What the Court wants to know is, did such a rain and frost occur, and if it did, when?

A. I don't recall exactly the date.

The COURT.—A hydrographic report would show very clearly [37—11] when anything of that kind occurred.

WITNESS.—(Continuing.) Such a rain and frost did occur during the canning season, during the tomato season. That was in 1916. I think in 1916 we had rain during the latter part of October; usually our canning season does not end until the end of November. We have worked as late as December 10th canning tomatoes. The usual tomato season, when they first ripen, is from about the 20th of August to the end of November, the 30th of November.

The COURT.—I thought you said the capacity of this machine, during a period of about ten weeks, the usual tomato season, was 30,000 cases?

A. Yes, your Honor. The idea is this—

Q. You are specifying a month longer season.

A. But you see at the beginning of the season your quantity of raw material that comes in is very limited, because you are only picking a few, and at the latter end of the season you are very limited, because you are only picking a few; but you have the bulk of this material within those ten weeks. That is what is called the peak of the season.

(Testimony of Victor V. Greco.)

WITNESS.—(Continuing.) I think these rains extended beyond the Santa Clara Valley, all over the state. The effect of these early rains upon the tomato crop decreases the tonnage. The effect upon the tomato crop in the Santa Clara Valley decreased my tonnage.

Mr. McNAB.—Q. To what extent, what was the effect on the crop that was out in the field? Describe it to the Court.

A. You would not get two fields that were alike, Mr. McNab, because one field, if properly taken care of, regardless of rain and weather conditions, will produce maybe 25 tons of tomatoes to an acre. Another field in the same valley and handled by some other man, not properly cultivated, will produce, maybe, only three tons [38—12] to the acre.

WITNESS.—(Continuing.) After this rain occurred it was followed by a heavy frost. As a result of that rain and frost we could not secure tomatoes to continue the running of our plant, and it could never be done, because we cannot buy tomatoes in the open market; there are none to be had. The tomatoes are usually contracted for by all the canneries. We figure out our tonnage of requirements, and we base our acreage on the yield per ton and contract accordingly. When we buy tomatoes, we do not buy by tons, but we contract for acreage of different patches, maybe ten, twenty or thirty patches; one patch will have five acres, another 20 or 30 or 40. We contract to take all their

(Testimony of Victor V. Greco.)

tomatoes, provided they are ripe and in good condition. After this rain and frost occurred, it would absolutely not have been possible within my knowledge, to have secured tomatoes in any other locality, either in California or elsewhere.

The COURT.—He has not yet stated when this rain occurred. He said he thought a frost occurred. When did these occur?

A. Your Honor, I said that the rains, my recollection was, were about the latter part of October, during the peak of the season; we had our first rains then, and then these rains were repeated, and then we had an early frost, which I do not recall the date of any more, but there were early frosts caused by the early rains.

Mr. McNAB.—After these rains and frosts occurred, did you notify the plaintiff in this case?

A. Yes.

WITNESS.—(Continuing.) I do not remember when I notified them. I would have to refer to my memorandum.

Mr. McNAB.—With regard to conditions throughout the Santa Clara Valley, what was the effect on the entire tomato crop with regard to all canneries there under operation? [39—13]

A. They all more or less suffered.

Q. With regard to whether or not there was short pack in all canneries, what was the fact as to that?

A. There was a prorate delivery on canned tomatoes that year by many other canneries, I think.

Thereupon the defendant introduced in evidence and there was read into the record the following letter addressed by the defendant to the plaintiff:

Defendant's Exhibit "B."

"San Jose, California, October Twelfth, 1916.

"P. Pastene & Co.,

"Boston, Mass.

"Gentlemen:

"Your communications of recent dates were received. We have failed answering you sooner for several reasons. The writer has been very busy with factory operations, particularly with the new line for the salsini, which has proven a failure as to getting out the quantity that we expected, due to the fact that the tube system in our vacuum pans is wrong. We can only operate this for a short period and it takes from five to six times the time for cleaning out.

"The tomato pulp contains quite a percentage of albumen and this causes the material in the tube to burn. We are now operating on about a 25% efficiency and been compelled to reduce the concentration somewhat so as to enable us to get some out.

"We are now pretty late in the season and from all indications it appears that not over a 25% delivery can be made of which we are extremely sorry as we intended to make full delivery, notwithstanding that our contract provides for prorate delivery.

"We are sending you sample by parcel post and

(Testimony of Victor V. Greco.)

trust to hear from you by return mail. You may also inform us that if in the [40—14] event the embargo on the Sunset Gulf shipments is still on whether or not we could ship over rail. For your information we may also add that the crop this year is very short as we have had considerable rains which has caused much damage.

"With kindest regards to your Mr. Chas. Pastene, we wish to remain,

"Yours truly,

"GRECO CANNING CO.,

"By V. V. GRECO."

Said letter was received in evidence and marked Defendant's Exhibit "B."

WITNESS.—(Continuing.) That letter dated October 12, 1916, refreshes my recollection with regard to the time of the rains. We must have had rain at that time, or I would not have written that letter. My recollection at this time, when I was testifying was about the latter part of October. Now this refreshes my memory that the rains were earlier, that is, they were in the early part of October. With respect to October 12th—the very peak of the season is between the 1st and 15th of October—the very peak of the season. If a rain occurred prior to October 12th, it would occur during the peak of the season. From the time that these rains occurred, we were not able to secure tomatoes fit for canning anywhere.

The defendant here offered, and there was received in evidence and marked Defendant's Exhibit

"C," the answer of the plaintiff to said letter. Said letter is as follows:

Defendant's Exhibit "C."

(Letterhead of P. Pastene & Co., Inc., Boston.)

"Oct. 25th, 1916.

"The Greco Canning Co.,

"San Jose, California.

"Gentlemen: [41—15]

"We duly received your favor of the 12th to which we have not sooner replied as we have been waiting the receipt of the samples of salsa which you stated in said letter you were forwarding by parcels post. Appreciating that frequently, considerable delay occurs in the delivery of these packages, we have felt, until today, that the failure to receive these samples was simply the result of such a delay and that they ultimately would be delivered but when today after a lapse of thirteen days from the writing of your letter, they have not as yet come to hand, we have decided to wire you as follows:

> "'Salsa samples not received duplicate immediately registered special delivery telegraph.'

"This telegram we believe clear and we now look forward to your wire advising that the duplicate samples which we have requested have been forwarded. Meanwhile, should the first lot come to hand, we will immediately examine them advising you of our decision in the matter.

"We regret exceedingly to learn the serious difficulty you are experiencing with machinery, owing to the fact that the tube system in your vacuum pans is wrong. Certainly your advice that you cannot now estimate on making more than a 25% delivery is a severe disappointment. We certainly trust that you will find that you have been over-conservative in making this estimate and that it will be possible for you to make considerably larger delivery than this statement would now indicate.

"At this time we will only state that if you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you. It is obvious, naturally, of course, that in any [42—16] case we shall expect a full *pro rata* delivery of all such goods as you are successful in producing.

"Shipment: We are informed that the embargo on water shipments is to be lifted tomorrow so that we trust that you will find no difficulty in making shipment via. this route. Should conditions however make it necessary that we furnish you with corrected shipping instructions, when the goods are ready for delivery communicate with us by wire if necessary and we will immediately furnish you with these necessary instructions.

"Trust that your later news may advise a material improvement in the unfortunate conditions confronting you, and reciprocating in behalf of our Mr.

(Testimony of Victor V. Greco.)

Charles A. Pastene who is at present out of town, the kind regards extended, we beg to remain,

"Yours respectfully,

"P. PASTENE & CO., INC.

"P. R. PASTENE."

Q. Now, in response to this statement contained in this letter which I have just read, "We certainly trust that you will find that you have been over-conservative in making this estimate, and that it will be possible for you to make considerably larger delivery than this statement would now indicate," you testify that you were only able to produce 19.2 per cent? A. 18.2 per cent.

Q. And actually delivered to Pastene?

A. 22.2 per cent.

WITNESS.—(Continuing.) In response to the portion of the letter which reads: "At this time we will only state that if you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in a reasonable fashion in considering the unfortunate condition [43—17] which has confronted you," I left absolutely nothing in my power undone to comply with my contract in every respect. I was personally, myself, at the plant, in the vacuum till one and two o'clock in the morning to see that the work was pushed ahead.

Thereupon the defendant offered and there was received in evidence and marked Defendant's Exhibit "D," the following letter:

Defendant's Exhibit "D."

(Letterhead Greco Canning Company.)

"San Jose, California, November 2d, 1916.

"P. Pastene & Co.,

"Boston, Mass.

"Gentlemen:

"Your kind favor of the 25th to hand and contents noted. We are extremely sorry of having had to prorate deliveries for reasons set forth in our previous letter. Twenty per cent is about the very best that we are going to be able to fill. Regardless of this, so as to make up a minimum car we have shipped you 665 cases for which inclosed find copy of invoice, and draft will reach you through one of the banks in New York, which was forwarded through the Bank of Italy, of this city.

"We are now planning for a new arrangement for next season and will install a different system of vacuum pans, and hope to be more fortunate in our pack.

"Yours very truly,

"GRECO CANNING CO.,

"By V. V. G.

"P. S.—Invoice mailed under separate cover."

There was thereupon introduced in evidence by the defendant and marked Exhibit "E" the following letter:

Defendant's Exhibit "E."

"Boston, November 7th, 1916.

"The Greco Canning Co., [44—18]

"San Jose, California.

"Gentlemen:

"Confirming ours of the 30th ultimo.

"SAMPLES: The duplicates which you have sent to us by express came to hand a day or two ago and upon examination, we find that in fact, as you previously advised, the concentration is not all that it should be. However, considering the unfortunate circumstances which you have encountered, as explained to us in your recent favors, we have no complaint to offer and providing the delivery you make to us is equal to the sample received, we shall consider the delivery a good one.

"SHIPMENT: We had rather hoped to have received definite advice that shipment which your telegram of October 26th advised would probably go forward in a day or two, was now actually on the way. We certainly trust there will be no particular delay in the forwarding of this lot and that we may hear from you now any day that the goods are in transit.

"PRO RATA: We understand that weather conditions have greatly improved during the last ten days in your country and that a long packing season is anticipated. We surely trust that these predictions may not miscarry as in that case we are confident that you will find it possible to considerably increase the production which you previously

(Testimony of Victor V. Greco.)

estimated as possible. As previously written you, we certainly have no intention of being unreasonable or expecting from you that which it is physically impossible for you to accomplish, but we do expect, of course, that you will spare no efforts to, as nearly as possible, fill your contracts, and it is for this reason that knowing that conditions have materially improved since you previously wrote us on this subject, we look forward to a better delivery than previously predicted. Knowing that [45—19] you will not spare any reasonable efforts to attain the desired result, we look forward in anticipation to your more favorable news as mentioned.

"Yours Respectfully,

"P. PASTENE & CO., INC.

"P. R. PASTENE."

WITNESS.—(Continuing.) With reference to the date of this letter, November 7th—on November 7th there would not be any tomatoes left on the vines. There was absolutely nothing that we could have done after November 7th in any way to have increased the pack. Mr. Pastene was just imagining that conditions had improved here.

Thereupon defendant introduced in evidence and there was marked as Defendant's Exhibit "F" the following letter:

Defendant's Exhibit "F."

"San Jose, California, November 13th, 1916.

"P. Pastene & Co.,

"Boston, Mass.

"Gentlemen:

"Your esteemed favor of the 7th to hand. By this time, undoubtedly, you are in receipt of advises of shipment of car via Sunset Gulf of tomato paste. The conditions have not improved as expected. As a matter of fact, we have had a very early frost which has put a stop to the canning. We are obliged to discontinue canning tomatoes, and are now running our line on the Salsa, expecting to finish the season on this so as to enable us to make good our 20% delivery to our other firms who have not had 20%, and some none at all. We are doing this at a great loss to us, as you know the tomato market on 2½ cans has advanced about $1.00 per case.

"We assure you we are extremely sorry that we are not able to do any better than we did, and we hope next season to be [46—20] more successful. We are anticipating re-arranging this line and installing a different apparatus.

"Yours very truly,

"GRECO CANNING CO.,

"By V. V. GRECO."

Thereupon there was received in evidence and marked Defendant's Exhibit "G," the following telegram:

(Testimony of Victor V. Greco.)

Defendant's Exhibit "G."

"New York, Dec. 19, '16.

"Greco Canning Co.,

"San Jose.

"Sales just arrived billed as tomato sauce instead of canned vegetables Southern Pacific demanding ninety cent rate. Kindly arrange agents there correct rate to forty. Further sauce very liquid not similar quality shipments made others sauce which considerably more concentrated we protest the quality and protect per cent delivery as against fifty sixty per cent made to others our contract one of the first made. Await your remarks.

"P. PASTENE CO., INC."

Mr. McNAB.—Q. Did you deliver 50 or 60 per cent prorate delivery to anybody?

A. Not 50. I did deliver in two small cases, no, three, 50 per cent.

Q. Those were as to the size of the shipment what?

A. The contract with Schmidt & Ziegler for 200 cases, we delivered 100. That made a 50 per cent delivery, and this shipment was made early in the season, when we expected we were going to pack more than we actually packed.

Q. There were only 200 cases?

A. Yes. There is another item where we had sold 20 cases and delivered 10, and another item where we sold 10 and delivered 5. There are only three cases where there was a 50 per cent delivery.

Q. They are the only deliveries of a greater per

(Testimony of Victor V. Greco.)

cent than the [47—21] ones that were actually delivered to the plaintiff? A. Absolutely.

Q. All the others that you delivered to your customers were down to between 15 and 20 per cent?

A. Yes.

There was thereupon received in evidence and marked as Defendant's Exhibit "H," the following letter:

Defendant's Exhibit "H."

(Letterhead P. Pastene & Co., Inc., New York.)

"Dec. 19/16.

"Greco Canning Co.,

"San Jose, Calif.

"Gentlemen:

"We confirm our wire of this date which we consider clear; we will take up the points, however. in the order named.

"FREIGHT RATES: Owing to the fact that you shipped these goods as tomato sauce, we were surprised to find that the Southern Pacific charged us a 90-cent rate as against the 40-cent rate from terminal or 45-cent rate from San Jose, under which rate we have received various other shipments of tomato products, such as, for example, Del Monte sauce. The rate clerks here refused to correct the rate, stating that tomato sauce pays a 90-cent rate as by them billed, or double the regular tomato pulp, ketchup or canned tomato products rate, and therefore we have requested that they wire back to the coast for instructions to correct and we advised you also along the same lines.

Prompt attention to the matter will help considerable.

"QUALITY OF SAUCE: While the samples which you sent us some time ago were very liquid, owing to the statement which you made in your explanation of the trouble with your coils, etc., we—with the idea of being fair to you, and not asking the impossible—stated nothing or made no serious complaints. Meanwhile, however, while goods were in transit we have seen samples of your [48—22] sauce which other concerns have received, and were surprised to see that the quality was much more concentrated. However, we made no comments or did not write you then, believing that when the actual shipment was made, quality of the concentration of the goods which you had shipped us would unquestionably be up to the standard shipped to others previous to our shipment, inasmuch as you know you delayed considerably in forwarding our goods, whereas you made shipments to our competitors much earlier.

"Now, imagine our surprise upon getting a can as a sample, to find that it is even more liquid than the samples which you sent us; in other words, it is not a tomato sauce at all, but simply a tomato ketchup, or a consistency not much greater than water. This is not a fair deal and one unworthy of yourselves and unjust to us who trusted you, and were one of the first to sign your order. In fact, the writer was one of the first to see you on this article at all. We repeat what we stated in

(Testimony of Victor V. Greco.)

our telegram, we protest this sort of article and demand an explanation before going further in the matter.

"PRO RATA DELIVERY: You gave us a 23% delivery on our contract and we have since learned that other concerns have received considerably more. Two concerns who we know of in the South advised that they have received 50% delivery from you. Right is right and we demand a fair, honorable deal, and we now ask you to please be good enough to tell us what you intend to do in the matter.

"Awaiting a prompt reply to our communication as we dislike having any friction, we beg to remain,

"Yours respectfully,

"P. PASTENE & CO., INC.

"C. A. P. Per U." [49—23]

WITNESS.—(Continuing.) Beyond these three small shipments I have testified to, there were absolutely no others who ever received a larger prorate delivery than the two, and the one that he refers to in the South is the Schmidt & Ziegler case, where they bought 200 cases and we shipped only 100 early in the season, and we had to complete the car because it was a mixed car; in that car were included other products.

There was thereupon received in evidence and marked as Defendant's Exhibit "I" the following letter:

Defendant's Exhibit "I."

"San Jose, California, Dec. 26, 1916.

"P. Pastene & Co.,

"New York City, N. Y.

"Gentlemen:

"We are in receipt of your favor of the 19th. On receipt of your wire several days ago, we immediately got busy at this end with the Southern Pacific Co., and succeeded in obtaining the 45¢ rate for you. It was no mistake of ours in billing it as Tomato Sauce, as this is actually what it is, but we had, prior to going ahead with the pack of this article, taken this matter up with the Transportation Co., and had succeeded in getting the 45¢ rate, which applies to canned goods of this commodity. We had this letter to show and this enabled us without any difficulty in settling the matter.

"You complain about having received your sauce too late. This was no fault of ours as this was among the early shipments, but as same went Sunset Gulf, it took almost two months to get to destination, while the other goods shipped all rail to New York got there, and while shipped later than this, got to destination in much shorter time.

"As to the quality, we believe that you will find it equal to others on opening up cans from other cases. Our pack [50—24] was not uniform on account of reasons explained in our previous letters. We had to make the best of the situation and get out as large a quantity as we possibly could.

"In regards to your complaint as to short delivery, we assure you that you got a larger delivery than many others, some did not succeed in getting but 15½%. In the beginning of the season we thought that we would succeed in packing about a 50% delivery, but we regret to advise that we did not succeed in doing so. Your shipment being earlier than some of the others, constituted a larger delivery, while the very last that we shipped out, all that we could deliver was a 15½% as mentioned above.

"Owing to advance on all supplies and raw material the cost of this product next season is going to be considerable higher and if you are satisfied with the goods, we are inclined to protect you on a limited amount—say about the quantity that we fell short, at $10.00 per case.

"Knowing of the faults with the machinery we feel that during next season's pack, we can remedy this and succeed in packing the article that we have in mind, of a good consistency. If this appeals to you, we will issue new contracts for next year's pack. It is our desire to first protect our customers before offering any of next year's goods for sale to new buyers.

"Awaiting to hear from you, we remain,

"Yours very truly,

"GRECO CANNING CO.,

"By. V. V. G."

There was thereupon received in evidence and marked as Defendant's Exhibit "J" the answer thereto, which is as follows: [51—25]

Defendant's Exhibit "J."

(Letterhead P. Pastene & Co., Inc., Boston.)

"January 10th, 1917.

"The Greco Canning Co.,

"San Jose, California.

"Gentlemen:

"We acknowledge receipt of your letter of the 26th, which for some unaccountable reason delayed in arriving.

"We have noted the contents of your communication and will take the items therein referred to under separate heading.

"FREIGHT RATE SOUTHERN PACIFIC: Matter was adjusted on the 45¢ rate and note how it was possible to do so. However, if you had billed as 'canned vegetables' you would have saved us a week's time at least in obtaining the goods.

"QUALITY: We can only repeat that which we have previously stated,—of the various samples which we have opened from various cases taken at random, we have never found anything but a very liquid sauce, whereas we have seen samples taken at random from cases others had received in New York under your same brand in which the sauce was of a very much greater consistency. From the reading of your remarks, it would seem as if the consistency ran uneven throughout the entire pack, whereas we presume you really mean that sometimes the out-turn was better than at other times, and assuming that is the case, we certainly received,—we should take it from the looks of the

goods—one of the very worst lots. We of course realize that you had trouble with your machinery and are trying to make allowances. None the less, we cannot feel entirely satisfied with the treatments received on this item and it would be useless for us to attempt to tell you anything different.

"PERCENTAGE OF DELIVERY: We have no doubt that your statements are true in so far as they go. You tell of having delivered [52—26] as low as 15½% but you do not state the highest per cent against delivery. We can only repeat that which we have already advised you—of information received from other sources of as high as 60% delivery and we certainly do not see why we should be elated at having received about 20% as against 15½ of some others.

"Lastly we note what you state about perfecting the machinery and your belief that during next season you can pack an article of a good consistency—whatever that may mean—and that you desire to make up the deficiency or short delivery of this year by offering to protect the quantity you fell short on a basis of $10.00 per case. Inasmuch as you are offering thru your New York brokers, Messrs. Seggerman Bros. & McNeiff—so we understand, for kindly note we do not make this as a positive assertion—on a basis of $11.00 per case f. o. b. terminal California with a 40¢ allowance for freight, we do not see where you are making us such a 'great' proposition.

"Honestly we are thoroughly disappointed! We cannot feel that you have treated us justly in this

(Testimony of Victor V. Greco.)

present season. Our information was that you should have been able to deliver our 60%. We have further information that you have sold pulp to various concerns. We appreciate that possibly that was due to machinery trouble.

"In conclusion, we can but state that we feel we are entitled to a further delivery on the 1916 pack and expect you will do so, and shipping a better quality than the one shipment made.

"As to the new pack, we are willing to close with you for 3000 cases of the new pack, subject to goods being of such quality as you are well aware they should be, and satisfactory to us, at the price you name of $10.00 per case less allowance of freight on a basis of 40¢ per hundred. We await to hear from you on our coments.

"TOMATOES, EXTRA'S AND STANDARD'S: We would like to treat with you for a purchase of next season's pack. What can you offer?

"Yours respectfully,
"P. PASTENE & CO., INC.
"C. A. P." [53—27]

WITNESS.—(Continuing). I did not enter into a contract for the delivery of Salsa De Pomidoro for the following year with him. We could not come to a satisfactory arrangement as to price.

Thereupon there was received in evidence and marked Defendant's Exhibit "K" the following telegram:

Defendant's Exhibit "K."

(Western Union Night Letter.)

"San Jose, Calif. Jan. 16, 1917.

"Pastene & Co.,

"69–75 Fulton St.,

"Boston, Mass.

"Replying to your letter of tenth instant impossible to accept conditions named therein. Consequently our offer to supply three thousand cases Salsa di Pomidoro at ten dollars per case is hereby withdrawn. Confirmation of this telegram being sent you by registered mail.

"GRECO CANNING CO."

There was thereupon received in evidence and marked as Defendant's Exhibit "L" the following letter:

Defendant's Exhibit "L."

(Letterhead of P. Pastene & Co., Inc., New York.)

"Jan. 18/17.

"Greco Canning Co., San Jose, Calif.

"Gentlemen:

"Our Boston house forwards the writer your wire of the 16th, reading:

"Replying to your letter of tenth inst. impossible to accept conditions named therein, consequently our offer to supply three thousand cases salsa di Pomodoro at ten dollars per case is hereby withdrawn confirmation of this telegram being sent you by registered mail.

"In reply to the above wire, we have nothing to state at the moment, preferring to await your letter of explanation, [54—28] which we presume accompanies copy of this wire which you state you are forwarding by registered mail; upon receipt we shall then state whatever will be necessary and in order.

"Meanwhile we beg to add that we protest against this action as unwarranted and unjust.

"Yours respectfully,

"P. PASTENE CO., INC."

There was then received in evidence and marked Defendant's Exhibit "M," the following letter:

Defendant's Exhibit "M."

"San Jose, California, January Fifth, 1916.

"P. Pastene & Co.,

"152 Franklin St.,

"New York, N. Y.

"Gentlemen:

"Knowing your house to be large Importers of Naples Canned Tomatoes, we have some 8000 cases of Solid Pack peeled Tomatoes, quality of which if any different will be superior to that packed in Naples, Italy. If you are interested we will quote you a very attractive price.

"Regarding Naples Tomatoe Sauce packed in small 6 oz. tins, in view of the present conditions in Europe which makes it almost impossible to receive any of this commodity from said country, we are contemplating to pack about 60,000 cases of the

article above mentioned which will be sold as a substitute of the Imported.

"As we are Italian and know what the Italian people must have and being very familiar with the method of manufacturing this article, you can rest assured that it will be the equal of that imported from Italy.

"We will greatly appreciate a line from you in regards to the above and thanking you in advance for same, we are,

"Respectfully yours,
"GRECO CANNING CO.,
"By A. G." [55—29]

"P. S.—We are located in the heart of the Santa Clara Valley where some of the finest tomatoes in the world are grown.

"Inform us of all the articles you are interested in, perhaps we are in a position to furnish same."

There was thereupon received in evidence and marked Defendant's Exhibit "N," the following letter:

Defendant's Exhibit "N."

(Letterhead of P. Pastene & Co., Inc., Boston.)

"January 15th, 1916.

"The Greco Canning Co.,
"San Jose, California.

"Gentlemen:

"We have to acknowledge receipt of yours of the 5th in reference to Naples style Peeled Tomatoes.

"We beg to advise that we are large users of the Italian Tomato and should be pleased to hear from

you with prices on the goods you have to offer. We should also, of course, expect to be furnished with sample.

"TOMATO SAUCE: We are also large handlers of this article. When you are in a position to quote prices and submit samples on the goods of this class which you expect in the near future to have ready to put before your trade, we should certainly appreciate hearing from you.

"Awaiting your further news, we remain,

"Yours respectfully,

"P. PASTENE & CO., INC.,

"P. R. P."

There was thereupon received in evidence and marked Defendant's Exhibit "O," the following letter:

Defendant's Exhibit "O."

"January Twenty-second, 1916.

"P. Pastene & Co.,

"Boston, Mass.

"Gentlemen:

"Your esteemed favor of the 15th inst., to hand and contents [56—30] noted. We wish to thank you for your prompt reply to our previous letter and for the interest shown in our products.

"In accordance to your wishes we are today forwarding to you by Wells, Fargo Express, charges prepaid sample of 6 tins of our Solid Pack Tomatoes as this is the only article that we have presently to offer for spot shipment. We offer these for prompt acceptance and shipment and subject to

prior sale at 95¢ per dozen less 1½% cash ½ of 1% swell allowance F. O. B. San Francisco, enabling you to enjoy the 40¢ rate via Sunset Gulf.

"These goods are packed 2 dozen to the case weighing 60 pounds. To enjoy the 40¢ rate minimum capacity is 80,000 pounds. This same rate applies to New York and Philadelphia.

"You will notice on receipt of these samples the excellent quality of this pack and trust that you will see fit in placing your order with us.

" 'Salsina.' The information furnished us on this article was very interesting. We will endeavor too in the near future to forward you samples of this article that we propose to pack.

"We have an idea to improve upon the package and we wish to mention it and will be very much pleased to have your views, that is instead of packing 200 cans to the case as the imported, to pack this in fiber cases containing 100 cans each. This article is sold at so much per 100 and therefore the size of the container will have no bearing on the selling price. The advantage of this style of container will be the saving in freight rate which in our estimation will amount to about 20% which in itself is quite a large item or about $64.00 per car.

"What we propose to pack is a very high class article and if possible to improve upon the quality of the Italian we will endeavor to do so. We also wish to know if you favor the Basilica [57—31] flavor?

(Testimony of Victor V. Greco.)

"Trusting to hear from you again soon, we wish to remain,

"Yours very truly,
"GRECO CANNING CO.
"By ————————."

The COURT.—What is Salsina?

A. It is a little leaf; it is an herb.

There was thereupon received in evidence and marked Defendant's Exhibit "P," the following letter:

Defendant's Exhibit "P."

"February 21st, 1916.

"The Greco Canning Co.,
"San Jose, California.

"Gentlemen:

"We duly received your favor of January 22nd, to which we have not sooner replied as we have been giving your remarks our consideration and attention. We also have examined the sample Tomatoes which you have forwarded and which you have offered us in your above mentioned letter.

"We will not attempt to reply to your letter in detail at this time in view of the fact that our President, Mr. C. A. Pastene, finding it necessary to be in San Francisco some time within the next ten days, he will at that time arrange to communicate with you when the matter of possible arrangements for handling your products in the future can more advantageously be taken up than is possible by mail.

"In the meantime, we beg to remain,

"Yours respectfully,

"P. PASTENE & CO., INC.,

"Per P. R. P." [58—32]

There was thereupon received in evidence and marked Defendant's Exhibit "Q," the following letter:

Defendant's Exhibit "Q."

"March Sixth, 1916.

"Mr. Chas. A. Pastene,

"c/o Mr. R. S. Edwards,

"Berkeley, Calif.

"Copy: P. Pastene & Co., Inc., Boston, Mass.

"Dear Sir:

"Referring to yesterday's conversation concerning the lot of De Luxe Sauce that we offered you at 85¢ F. O. B. Boston, please be advised that in making you these prices, we failed to call your attention to the trade discount of 10% as the 85¢ price given you was intended for the retailer, so as you will see our price to you will be 85¢ less 10% trade and 1½% per cent cash F. O. B. Boston."

"We also wish to mention as a reminder the lot of No. 2–½ Solid Pack that we still have to offer on which we quote you a price of 90¢ F. O. B. San Francisco less discount as per our previous correspondence.

"REF. SALSINA. We are very much *in*thused of the outcome of your visit here yesterday to our plant as several points of very much interest to us was brought out concerning this article and on

(Testimony of Victor V. Greco.)

arrival of samples that you have volunteered to have your house send us, we will immediately on receipt of these samples address you again.

"You will agree with us that it is going to be somewhat impossible for us to state whether we can duplicate these goods but the writer made clear to you as to what we intended to do for the packing of a high class article. It is very interesting to note the quantity that you people handle to the extent that we [59—33] now feel that our contemplated equipment should be enlarged and go at it on a much larger scale than we had planned.

"Thanking you for your visit yesterday and trusting that you have arrived at your destination safely and with best regards to Mr. Edwards and yourself, I wish to remain,

"Yours very truly,

"GRECO CANNING CO.

"By ————————————."

Mr. McNAB.—Q. This letter was written the day following a conversation with Mr. Pastene. That conversation occurred where?

A. At my office in San Jose.

Q. Did you have more than one interview with him?

A. I am not quite sure but what he called twice.

Thereupon there was received in evidence and marked as Defendant's Exhibit "R," the following letter:

(Testimony of Victor V. Greco.)

Defendant's Exhibit "R."

(Letterhead P. Pastene & Co., Inc., Boston.)

"March 10th, 1916.

"Greco Canning Co.,

"San Jose, California.

"Gentlemen:

"At the instructions of Mr. C. A. Pastene, we have sent you a parcel containing sample cans of Cirio and Piedigrotta brands of Naples Salsa or Tomato Sauce.

"We trust this package will reach you promptly.

"Yours respectfully,

"P. PASTENE & CO., INC.,

"Per P. R. P."

Mr. McNAB.—Q. What is Cirio?

A. That is the imported article. There were two sample cans they sent us of the imported, to give us an idea of what the requirements would be, so that we could duplicate them, if possible. [60—34]

Q. Prior to this time, had you ever produced any Salsa De Pomidoro?

A. Not for commercial purposes, except making some experiments.

There was then received in evidence and marked as Defendant's Exhibit "S," the following letter:

(Testimony of Victor V. Greco.)

Defendant's Exhibit "S."

"March Twenty-ninth, 1916.

"P. Pastene & Co.,
"69 Fulton St.,
"Boston, Mass.

"Gentlemen:—

"The samples of Cirio and Piedigrotta brands of Naples Sauce have been received for which accept our thanks. We have examined this article and cannot see any reason why we cannot duplicate it.

"We have everything in such a shape to enable us to go ahead with the pack of this article of which we now mention a price of $3.50 per hundred F. O. B. San Jose, regardless of the fact that we know that the Imported is now selling at $15.00 a case, which price in our estimation is prohibited as we cannot see how the consumer can afford to pay 10¢ for a can, as this price would have to be *ask* by the trade, when they can buy tomatoes at a cheaper price.

We are confident that if we once get in with our article that it will stick and we are now working on these lines. This accounts for our low prices that we have named, however, we will only book a limited amount of business on these basis as we much prefer a wide distribution.

"As promised your Mr. Pastene, we are now offering you this article at the price mentioned above, and if you are interested, we would be glad to hear

from you soon. Our offer is for prompt acceptance and subject to our confirmation.

"We wish to impress upon you the fact that the quality [61—35] will be A–1 and we will guarantee it such.

"If you are still in the market and have not made other arrangements, we would be pleased to hear from you by return mail.

"With best regards to your Mr. Chas. Pastene whom the writer has had the pleasure of meeting, we remain,

"Yours very truly,
"GRECO CANNING CO.
"By ————————————."

There was then received in evidence and marked as Defendant's Exhibit "T," the following letter:

Defendant's Exhibit "T."

"April 4th, 1916.

"The Greco Canning Co.,
"San Jose, California.

"Gentlemen:

"We have to acknowledge receipt of your favor of the 29th which we have noted with considerable interest.

"At this time, however, we beg to state that our Mr. C. A. Pastene, who you will remember took this matter up with you personally, has not as yet returned from the west and as the matter is one which he had personally been investigating and handling, we prefer to wait his return before replying to your letter in a definite manner. We expect

that Mr. Pastene will be back in Boston in a week to ten days and immediately that he is here we will place your letter before him for his attention.

"Meanwhile, thanking you for your prompt attention to this matter and assuring you that you will hear from us again in the very near future, we beg to remain,

"Yours respectfully,
"P. PASTENE & CO., INC.,
"Per P. R. P."

There was then received in evidence and marked Defendant's Exhibit "U," the following letter: [62—36]

Defendant's Exhibit "U."

"April Tenth, 1916.

"A. Pastene & Co., Inc.,
"Boston, Mass.

"Gentlemen:

"We have your favor of the 4th inst. to hand and learn that your Mr. C. Pastene has not yet returned, but trust that upon his return that we may hear from him promptly as you suggest.

"From the way we are booking orders on this product, it appears to us that prompt action must be taken by you as we wish to make good our promise to your Mr. C. Pastene of giving him an opportunity of purchasing some of these goods.

"We have just recently closed for 1000 cases with J. M. McNiece & Co., of New York at $3.50 per 100 F. O. B. San Jose. These people requested a larger quantity which we would not consent to.

"Awaiting to hear from you promptly on his return, we are,

"Yours very truly,
"GRECO CANNING CO.
"By ————————————."

"P. S.—Since dictating the above letter we have booked orders for Ignais-Gross of New York City for 1000 cases who wanted 2000 and Pornell-Proves for 1000 cases."

There was then received in evidence and marked Defendant's Exhibit "V," the following letter:

Defendant's Exhibit "V."

("Letterhead P. Pastene & Co., Inc., Boston.)

"April 22d, 1916.

"The Greco Canning Co.,
"San Jose, California.

"Gentlemen:

"The writer has just returned from his western and Mexican trip and finds your letters of March 29th and April 10th, contents of which he immediately read. [63—37]

"NAPLES STYLE SALSA: We are pleased, of course, to note that you are going ahead in the manufacture of this article and that you do not see any reason why you cannot duplicate the samples of Cirio and Piedigrotta brand which we sent you, that is say, make an article at least as good. We hope of course that yours will be even better.

"Also note what you state in reference to having already booked considerable goods and that you are waiting to hear from us as to the quantity which

we will take at the price you name of 3½¢ per tin f. o. b. San Jose, goods packed in cases of 100 tons. Now we do not wish to discuss the price because we believe that you will at least make us as low a price as you make to anybody and upon that assurance we will be very glad to pass you an order for such quantity as you feel that you can afford to book, not less than 1000 cases and we should very much prefer to have it several thousand cases. Tell us how much you can spare for us. It is of course understood, as you clearly state, the goods are guaranteed to be strictly A No. 1.

"By the way, you intend of course to put a leaf of sweet basil in each tin such as the Naples goods, do you not?

"Are anxiously waiting to hear from you so that we can be assured that we will not be left out in this matter.

"Writer wants to take this opportunity of thanking your Mr. Greco for the extreme courtesy and kindness shown to the writer on his visit to San Jose, assuring you that if the opportunity offers, such as for example you or your brother coming to Boston, he should be delighted indeed to have the pleasure of reciprocating in part if possible your most courteous hospitality.

"Looking forward to hearing from you shortly, we beg to remain,

"Yours respectfully,
"P. PASTENE & CO., INC.
"Per C. A. P." [64—38]

(Testimony of Victor V. Greco.)

WITNESS.—(Continuing.) None of our goods were ever rejected.

The COURT.—What is this little leaf mentioned in here?

A. That is a little herb; it is a little leaf like musk, and they place one of these in each tin and it gives it a flavor.

There was next received in evidence and marked Defendant's Exhibit "W," the following letter.

Defendant's Exhibit "W."

"April Twenty-eight, 1916.

"P. Pastene & Co.,

"69 Fulton St., Boston, Mass.

"Gentlemen:—

"Attention Mr. Chas. Pastene.

"Your esteemed favor of the 22nd to hand and contents carefully noted. We are enclosing our form of contract, the same as we have entered into with other firms. We will leave the quantity blank for you to fill in, quantity not to exceed 3000 cases, 200 tins to the case.

"It was our intention to pack these goods 100 tins to the case in fiber cases, but other buyers preferred a package similar to the Italian, that is 200 tins to the case and in wooden cases as this seems to be the road of least resistance.

"It is optional to you whether you want it with the Basilico or not, but we are to be notified on acceptance. If it be your preference to have goods packed 100 tins to the case in fiber cases, it will be

satisfactory to us as a matter of fact we prefer it, as it will enable us to ascertain whether this style package will take. There will be no difference in cost as the packing in fiber cases will cost as much as the other, but there will be considerable saving in freight rate, which will be to your advantage.

"We have advanced our price to $7.50 per case, since April 10th and have been successful in booking business on these basis. In keeping with our promise we will book your order at [65—39] our opening price of $7.00.

"We wish to thank you for your kind remarks and will promise you to pay you a visit at any time that either one of us happen to be anywhere within your vicinity and assure you that when we do that the pleasure shall be all ours.

"Thanking you for your most courteous letter and trusting to see you again in the near future, we wish to remain,

"Yours very truly,

"GRECO CANNING CO.

"By ————————————."

There was then received in evidence and marked as Defendant's Exhibit "X," the following letter:

Defendant's Exhibit "X."

"May Eleventh, 1916.

"P. Pastene & Co.,

"Boston, Mass.

"Gentlemen:

"As we have had no letter from you in reply to ours of April 28th, and sufficient time having

elapsed, we were obliged to-day to wire you as per enclosed copy of telegram and we look for an immediate answer, which we hope is forthcoming.

"Our actions in this matter are caused by other inquiries that we have and which we have refrained from closing due to the pending negotiations between us.

"Yours very truly,
"GRECO CANNING CO.,
"By ————————.

"VVG/EH."

There was then received in evidence and marked as Defendant's Exhibit "Y," the following telegram:

Defendant's Exhibit "Y."

"San Jose, Calif., May 11, 1916.

"P. Pastene & Co.,
"Boston, Mass.

"Wire prompt decision answering our letter April Twenty-eight immediately.

"GRECO CANNING CO." [66—40]

There were then received in evidence and marked by the respective exhibits at the head thereof, the following letters and telegrams:

Defendant's Exhibit "Z."

"Boston, Mass., 627 PM May 11, 1916.

"66 SFC 9

"The Greco Canning Co.,
"San Jose.

"Wrote you fully last Monday accept three thousand cases.

"P. PASTENE CO., INC.,
"3:58 P. M."

Defendant's Exhibit "AA."

(Letterhead P. Pastene & Co.)

"Boston, Mass., May 12th, 1916.

"The Greco Canning Co.,

"San Jose, California.

"Gentlemen:

"Yesterday afternoon we received your wire reading 'wire prompt decision answering our letter April 28th immediately' and although we thought our wiring you really unnecessary in view of the fact that we wrote you fully on Monday last sending you contract for 3,000 cases of Naples style salsa, nevertheless, we telegraphed you as per copy of our message herewith enclosed which undoubtedly reached you promptly.

"Yours respectfully,

"P. PASTENE & CO., INC.,

"Per ——————————."

Defendant's Exhibit "BB."

"May 8th, 1916.

"The Greco Canning Co.,

"San Jose, California.

"Gentlemen:

"We beg to acknowledge receipt of your communication of April 28th, contents of which had our careful attention. We found [67—41] enclosed the contracts to which you refer and we have filled same in for 3,000 cases and are returning them to you for your approval and signature, asking you to send us of course, one copy for our files.

"You will notice that we have inserted in a couple of places additional words to clear the meaning of what we had no doubt was exactly your intent in said contract but we thought that possibly it would be best for all concerned to have the matter clearly stipulated.

"The first is in reference to approval of sample. Naturally, in view of the fact that you have never made any of this article and therefore we have no means of knowing what you will put up, it is essential that we have an opportunity to pass judgment on the type of article you will manufacture by having sample tins sent for approval or rejection.

"The second is in reference to guarantee. We understand that it is customary for California canned good to be guaranteed against swells exceeding half of one per cent. We have incorporated that in the contract.

"The last is in reference to payment and we have no doubt that it is exactly what you meant in your contract but we thought we would clear it, that the payment is to be made on draft against documents or shipping receipt only.

"BASILICO: We will want a leaf in each tin and have added that on to the contract.

"SHIPPING CASES: We decided to have a part of them come in fibre cases and a part in wooden cases, this to find out how the fibre cases would go as being a new style package, we cannot tell offhand.

"SHIPPING INSTRUCTIONS: After we will have approved of [68—42] sample, we will give you the details in reference to these.

"Thanking you for taking the matter up with us and trusting this is only a forerunner for business of very much value and asking if you have any surplus pack you give us an opportunity as soon as you know what your pack will amount to, we beg to remain,

"Yours respectfully,
"P. PASTENE & CO., INC.,
"Per C. A. P.

"CAP:EMB.
"Enc."

Defendant's Exhibit "CC."

"May Thirteenth, 1916.

"P. Pastene & Co.,
"Boston, Mass.

"Gentlemen:

"Your esteemed favor of the 8th enclosing contracts to hand. We note your few corrections which we approve.

"And it is only in your case where we have succeeded in interesting buyers in fiber cases, and therefore due to the small quantity, that will be required, we are in doubt whether we may succeed in getting such a small quantity, however, we are very much interested and if it is possible to secure them, we will fill your order accordingly, otherwise we may have to put all in wooden cases, which we hope will be satisfactory.

"Another point on which there is a very small doubt, but that we will succeed and that is the Basilico. We have every reason to believe that we will succeed in growing sufficient to enable us to use it in our pack, as we have some growing now, and it seems to be doing well, of course it is hard to foresee what may happen. Offhand we would say that 99 chances out of 100, that we will be successful in adopting it. We wish to mention [69—43] this, so as not to disappoint you if we did not succeed, so we are therefore signing the contract as it stands.

"Yours very truly,
"GRECO CANNING CO.,
"By ————————."

Defendant's Exhibit "DD."

"May 20th, 1916.

"The Greco Canning Co.,
"San Jose, Calif.

"We beg to acknowledge receipt of yours of May 13th with enclosed signed contract.

"FIBRE CASES: If you do not put the article up in this package, wooden cases will be all right.

"BASILICO: There should be no difficulty on this because it grows very profusely anywhere and we know it grows very freely in California so we do not anticipate any trouble on this score. Of course, if it is impossible for you to obtain the leaf, naturally, we can only accept what nature provides.

"We are pleased indeed to have been able to make this small contract with your good selves since we

(Testimony of Victor V. Greco.)

believe it to be but the forerunner of a very large and profitable business. Later on, after your pack is assured, we wish you would remember that we will without question want more goods and we hope you will give us the first chance at it but when you send us your sample, you will probably be in a position to know how much more of the goods you could offer.

"Thanking you in advance for this consideration, we beg to remain,

"Yours respectfully,

"P. PASTENE & CO., INC.

"Per C. A. P.

"CAP:EMB." [70—44]

Thereupon the following took place:

Mr. McNAB.—Q. With respect to the furnishing of the basilico, what was done?

A. We adopted it where it was possible, at times when we were able to get it. In other words, in part of the pack, we had basilico, and part of the pack we did not. I don't recall whether, in Mr. Pastene's case, whether the basilico existed.

Q. Throughout this correspondence, Mr. Greco, there is a reference to samples. Did you send samples forward from time to time? A. Yes, sir.

Q. Were any of these goods ever rejected?

A. No, sir.

Thereupon there were received in evidence and marked by the respective exhibits at the head thereof, the following letters and telegrams:

Defendant's Exhibit "EE."

"July 21st, 1916.

"The Greco Canning Co.,
"San Jose, Calif.

"Gentlemen:

"How soon do you expect to be able to send us samples of the new Salsa, on which we have had the pleasure of making a contract with your good selves?

"Trusting to hear from you with good news by return mail, we beg to remain,

"Yours very respectfully,
"P. PASTENE & CO., INC.
"Per C. A. P."

Defendant's Exhibit "FF."

"July Twenty-sixth, 1916.

"P. Pastene & Co.,
"Boston, Mass. [71—45]

"Gentlemen:

"Answering your esteemed favor of the 21st, we will endeavor to forward you samples immediately during the first pack of this article. The tomato pack season in this section is later than elsewhere, as you know, starting in on or about September 1st. We have made all necessary preparations and we are now in a position to handle a large pack, providing crop conditions are favorable.

"With kindest regards, we remain,

"Yours very truly,
"GRECO CANNING CO.,
"By ————————.

"VVG/EH."

Defendant's Exhibit "GG."

"Sept. 28th, 1916.

"The Greco Canning Co.,

"San Jose, Calif.,

"Gentlemen:

"Since yours of August 29th, we have heard nothing further from you in reference to Salsa.

"At that time you wrote us that you expected to be running on this article about September fourth and that samples would be forwarded to us immediately. We are, of course, therefore surprised at not having heard from you by now and are writing asking you to be good enough to let us hear from you with the samples in question, as we are anxious to obtain the goods, as is but natural.

"We shall appreciate having you write us fully and frankly in reference to any matter or detail on which you think that you should communicate for the mutual interests of both, assuring you in advance that any remarks you may make will have our full consideration in all fairness and justice. [72—46]

"Thanking you in advance, and awaiting to hear from you promptly, we beg to remain,

"Yours respectfully,

"P. PASTENE & CO.,

"Per C. A. P.

"CAP:EMB."

Defendant's Exhibit "HH."

"1419

Oct. 30/16

Contract. P. Pastene & Co. Oct. 31/16

Boston, Mass.

Pastene & Co. Oct. 31/16

Prompt. New York.

1½ % P. Pastene & Co.

S/D.B/ New York, N. Y.

665 Cs. Salsa di Pamidoro	6 oz.	7.60	4655.00
Less 1½ % Cash			69.82
			4585.18

fob San Jose.

Reg."

Defendant's Exhibit "II."

"Jan. 23/17.

"Greco Canning Co.,

"San Jose, Calif.

"Gentlemen:

"We have had two complaints that two cases of your sauce were unlabelled. We are not sure that the two cases in question are all of the lot which were so shipped, namely,—without labels—for of course we have not examined each case, and so it may turn out that later on we will have more complaints of this nature, in which case we shall advise you. Meanwhile wish you would provide for the two cases in question by sending us sufficient labels so that we can have them attached. If you prefer

you might send enough to take care of five cases, to cover any possible similar contingency.

"Yours respectfully,
"P. PASTENE & CO., INC.
"C. A. P.

"CAP/NK."

Defendant's Exhibit "JJ."

"January Thirty-first, 1917.

"P. Pastene & Co.,
"New York, N. Y. [73—47]

"Gentlemen:

"We have your favor of the 23d informing us that so far you have located two cases of our Salsa unlabeled. We will not dispute this fact, however we cannot see how this occurred and undoubtedly it was due to some error in the warehouse. We are shipping to-day sufficient labels for same which we trust will reach you in time.

"Yours very truly,
"GRECO CANNING CO.,
"By ————————.

"VVG/EH."

Defendant's Exhibit "KK."

"Feb. 9/17.

"The Greco Canning Co.,
"San Jose, Calif.

"Gentlemen:

"We thank you for yours of Jan. 31st and we are to-day in receipt of the labels which you so kindly

sent us, and for which we thank you.

"Yours respectfully,

"P. PASTENE & CO., INC.

"U.

"RU/NK."

Defendant's Exhibit "LL."

"San Francisco, March 27, 1917.

"Greco Canning Company,

"San Jose, California.

"Dear Sirs:

"I am sorry that I missed your Mr. Greco when he phoned several days ago. I am also sorry that he did not advise me in advance of his visit to San Francisco, so that I might have arranged to be on hand to meet him.

"I trust that he expects to be in San Francisco again in the near future, and that he will, as per understanding, advise me [74—48] a day previous, either by mail or telephone, where I can meet him, as I am of course anxious to have his decision in the matter which I took up with him in San Jose.

"May I ask that you let me know at least approximately when I may expect to see Mr. Greco. A letter addressed to this office or to my Berkeley address will reach me without delay.

"Thanking you for the courtesy of a prompt reply, and renewing my expressions of regards, I beg to remain,

"Yours very truly,

"P. R. PASTENE.

"PRP/W."

Thereupon the following took place with respect to Exhibit "LL":

(Testimony of Victor V. Greco.)

Mr. McNAB.—Q. Mr. Greco, this alludes, in its language, to having your "decision in the matter which I took up with him when in San Jose." During the month of March, 1917, did you have an interview with Mr. Pastene in San Jose? A. Yes, sir.

Q. Concerning what matter?

A. Concerning a new contract for 1917 pack goods.

Q. Can you state the conversation?

A. Why, the sense of the conversation I can, yes. Mr. Pastene called in to see me, and in regard to entering into a contract for 1917 pack goods on the lines that we had had some correspondence, that is our offer to them as shown in one of our letters, and then followed up by a telegram which they had not accepted and our offer withdrawn. The fact was this, that when Mr. Pastene came to my office, the market for future pack, 1917 pack, was advanced considerably, I would say that we had had by that time made sales at $14.00 a case for 1917 pack goods. Mr. Pastene then wanted me to make good what I had promised him in this letter, a new contract at $10 a [75—49] case, which I refused to do.

Q. Now, prior to this conversation had there been any threat or intimation that you were to be sued on account of the failure to perform this contract?

A. That took place later.

WITNESS.—(Continuing.) Neither Mr. Pastene nor anybody on his behalf conveyed to me any intimation of dissatisfaction with our failure to supply other than as stated in this correspondence

(Testimony of Victor V. Greco.)

which you have read. The first intimation I had of litigation was after the meeting that we had in San Francisco at luncheon where I entertained him subsequent to this conversation—subsequent to the letter addressed to me from the Monadnock Building which you have just read.

There was next received in evidence and marked Defendant's Exhibit "MM," the following letter:

Defendant's Exhibit "MM."

"March 29, 1917.

"P. R. Pastene, Esq.,
"c/o Porterville Magnesite Co.,
"387–391 Monadnock Bldg.,
"San Francisco, Cal.

"My dear Mr. Pastene:

"Thanks for yours of the 27th instant and shall be in town on Saturday next, the 31st instant, and will call upon you at 1 o'clock with the hope that I shall have the pleasure of entertaining you at luncheon, thereby affording us an agreeable opportunity of discussing matters.

"Hoping that this will be a convenient time for you, and with kind regards, we are

"Yours very truly,
"GRECO CANNING CO., INC.
"By ————————.

"CC: P. R. Pastene,
"c/o R. S. Edwards,
"2241 Glenn Ave.,
"Berkeley, Calif." [76—50]

There was then received in evidence and marked Defendant's Exhibit "NN," the following letter:

Defendant's Exhibit "NN."

"Oct. 14–16.

"The Greco Canning Co.,

"San Jose, California.

"Gentlemen:

"REGISTERED.

"We confirm our telegram of October 5th and letter of October 7th, as well as the various letters written you prior to those dates and although fully a week has expired since our last letter was written and nine days since sending our telegraphic request for samples, you have so far neglected to communicate with us on this subject.

"We are informed you, and others as well, are now working tomato sauce, etc.—that you have already furnished other New York buyers with samples of your product and this information, in conjunction with the manner in which you are treating us is a cause of considerable surprise—let alone disappointment.

"After giving the matter considerable thought, we are led to believe only one conclusion is possible but knowing you as we do, we are loath to think and certainly do not want to, and cannot convince ourselves, that your silence is due to studied negligence.

"We must have an immediate response to our various communications and must also ask you once again that unless you have already forwarded our samples of your product, that you please be kind

(Testimony of Victor V. Greco.)

enough to rush them forward by express without any further loss of time.

"We feel sure in view of the patience shown your good selves so far, you will make it unnecessary for us to write you on this topic again.

"Yours respectfully,

"P. PASTENE & CO. INC.

"ALZ: EMB 10–24." [77—51]

WITNESS.—(Continuing.) The occasion for delay in sending samples was as follows: We did not have the samples at the time because each batch as stated before, that the product was not uniform; therefore, had I sent him a sample of a product packed at a particular time that the goods were going elsewhere, the shipment would not have corresponded to that sample, so I delayed in sending him samples so as to give him samples of the product that I was going to be able to deliver to him by correspondence—that the delivery was going to correspond with the sample.

There was then received and marked as Defendant's Exhibit "OO," the following letter:

Defendant's Exhibit "OO."

(Letterhead Greco Canning Company.)

"San Jose, California, October 21st, 1916.

"P. Pastene & Co.,

"69-75 Fulton St.,

"Boston, Mass.

"Gentlemen:

"Your registered letter of the 14th to hand. We

(Testimony of Victor V. Greco.)

must admit that you are perfectly justified in sending this, however, there was one of our letters in the mail when yours was forwarded. We are not taking the trouble to look up what we wrote you at that time, but we believe we explained the situation.

"We did not forward you samples for the reason that we had so much trouble with our Vacuum apparatus, that during these interruptions it was difficult to get the uniformity in the article and therefore had we sent you a sample and then the goods would of been different, there would have been some dissatisfaction. We are now operating this apparatus at about 25% capacity, as to work it continuously as the way we intended can not be done.

"We will send you some samples now that we are able to get [78—52] a more regularity, and will possibly try and get you out a car next week if everything goes right. There is an embargo on the Sunset Gulf shipments.

"Kindly advise us if you want this shipped all rail and to what destination.

"Awaiting your reply, we remain,

"Yours very truly,

"GRECO CANNING CO.

"By V. V. GRECO.

"VVG–LFL."

Thereupon the witness testified as follows:

Mr. McNAB.—Q. Mr. Greco, even if you had been able to run your plant at the capacity which you had originally calculated when you commenced your operations for 1916 were the rains and frost to which

(Testimony of Victor V. Greco.)

you have testified such that there was no product there to operate the cannery? A. If we had—

The COURT. — (Interrupting.) Read that. (Question read.)

A. Yes, sir, there would not be sufficient product, I might state, however, Mr. McNab, that we would probably have packed a small percentage higher of more goods than we actually packed if—

The COURT.—(Interrupting.) Q. If what?

A. If we had not had trouble with the machinery.

Mr. McNAB.—Q. And now, Mr. Greco, let me ask you, what quality of tomato—no, I withdraw that—is there any special quality of tomato that is required in order to make the Salsa de Pomidoro?

A. No special quality of tomato, except that tomato must be at its best when it is good, mature. In other words, a very early tomato, ordinarily the farmer will pick it before it is completely matured so as to begin shipping, and later on in the season, when the sunshine is not sufficient, why you do not then get the same color again and it is not adapted for that particular [79—53] purpose because you require a very highly matured red tomato to make a good product.

Q. And in order to make this product was it, or was it not, your effort to secure the tomatoes in exactly the prime condition for that purpose?

A. Yes, sir.

Q. And after the rain and the frost had fallen on these tomatoes, were they in a condition to make this product? A. No, sir, they were not.

Mr. McNAB.—I think that is all.

(Testimony of Victor V. Greco.)

Cross-examination.

To the best of my recollection the frost occurred early in November, 1916. Ordinarily, the season is not over until the 1st of December. We have operated as late as the 10th of December, which we can show by some of our records. I am now speaking with respect to frost. I think we commenced making Salsa De Pomidoro as soon as we got the tomatoes. We were anxious to try out our new equipment. That must have been about the first, the beginning of the month of September, because the tomatoes in the Santa Clara valley mature and deliveries are begun to the canneries on or about that time. They vary from August 25th to September 9th, according to climatic conditions. I can by referring to my records tell at what date we began to get our deliveries. (Witness referring to book.) On September 6th. Besides Salsa De Pomidoro we packed tomatoes de Luxe style, Spanish sauce, which is a local product which I had packed since 1913, the year that we established the business. We owned the brand known as De Luxe. We packed a solid pack under the "De Luxe" brand. We packed a solid pack for that season. A solid pack is the peeled solid tomato in a can. For the solid pack we use the same as we use for the Salsa [80—54] De Pomidoro, that is to say, the finest quality of tomatoes. I don't remember how many acres of tomatoes we had contracted for before the season of 1916.

A colloquy between Court and counsel here occurred with respect to the production of the contracts

(Testimony of Victor V. Greco.)

for the purchase of tomatoes prior to 1916. Thereupon the following took place:

The COURT.—It is not a question of the contracts. He is asking him about the number of acres that he contracted for.

Mr. COOLIDGE.—That is the only way that we will establish that fact of the acreage because these contracts show the acreage.

The COURT.—These businesses are not run in any haphazard way.

Q. You know how many acres you have contracted for, you know it in a general way, anyhow.

Mr. McNAB.—Q. Are the contracts in writing or oral? A. They are in writing.

Q. All of them?

A. Most of them, some oral, but most of them are in writing, but this dates back to 1916, Mr. McNab, if you were to ask me how many acres contracted in 1919, I could answer that immediately, but in 1916, it is four years ago, we have changed our office, moved into a new office, I don't know whether those records are available and if they are why he would have produced them.

The COURT.—Q. How much of a solid pack did you put up that year, your books show that, I suppose?

A. Our books would show it, but it would take sometime to dig it up in the sales, the book which is on the desk there.

Mr. LANNIGAN.—The defense here is short pack, one defense is a short pack, which, of course,

(Testimony of Victor V. Greco.)

means a pack less than estimated because of destruction of crops.

The COURT.—Either shortage or destruction of crop. [81—55]

Mr. LANNIGAN.—Shortage or destruction of crop and we are entitled to go into this matter.

The COURT.—It is perfectly obvious. I see your purpose and it is an entirely proper one.

Mr. McNAB.—If you care to proceed with another branch of it we will try to get you any information we have.

Mr. LANNIGAN.—Well, what I wanted to get at particularly on cross-examination was this very question of short pack.

Mr. McNAB.—Well, I will state to your Honor that that was an element that I wanted to go into myself and I had Mr. Greco make a thorough search at my request to see if they could be found.

The COURT.—Well, it is a showing that they must make. I could not find that there was any short pack from any evidence here now.

Mr. McNAB.—The witness testified that he had a sufficient quantity—

The COURT.—(Interrupting.) But Mr. McNab, that would not mean anything to me unless I saw his figures. These businesses are not run in their heads, they are run by records, they have got records of these things.

A. Your Honor, the amount of pack, of solid packs will be shown on that sale book there, everything that we sold, not only solid pack, every other com-

(Testimony of Victor V. Greco.)

modity that was manufactured is in that book, only I have not computed it, I did not know that I had to answer any such question and therefore I am not prepared, but it is in that book right there.

Mr. LANNIGAN.—I might ask another question, if you Honor will allow me to do so while—

Mr. McNAB.—(Interrupting.) Here is the book containing everything that we have.

The COURT.—Well, counsel is not required to search it out. [82—56]

Mr. McNAB.—We will lend any assistance that we can, if your Honor please. The witness has testified that he had tomatoes there in the field under contract that he could not use because they had rotted.

The COURT.—Go ahead.

Mr. LANNIGAN.—Q. Well, now, Mr. Greco, who are the firm of Pernell and Pierce—would you let me see exhibit "T," please—have I got the name right?

A. I have a slight recollection, and just by a strange coincidence in looking up my files I find a contract which I will show you. I see what you are digging at, I can explain that very nicely.

The COURT.—Just answer the questions.

A. I want to refresh my mind as to whether or not that is the proper name because I have a contract with McNiece. Mr. Redding, I would like to have the McNiece contract. It is in my brief case. With your permission, your Honor, I might go and dig it up.

(Testimony of Victor V. Greco.)

Mr. LANNIGAN.—It is in a letter of April 4, 1916, from Greco to Pastene, I think.

The COURT.—Well, it was mentioned, the name was mentioned in a letter from Pastene to Greco.

Mr. LANNIGAN.—Here is the letter that I am referring to. It is a letter of April 10, 1916 to Pastene and Company from Greco Canning Company: "P. S. Since dictating the above letter we have booked orders for Ignace Gross of New York and Parnell"—

A. It is Cornell, that is what I was referring to, which I will show was on McNiece, which was on McNiece's contract.

The COURT.—Show it to counsel.

A. And Mr. Lannigan, I will explain that to you until it is clear.

Mr. LANNIGAN.—(Interrupting.) Q. Just a moment, let me see it.

A. It is made out to Cornell, and this is written on the face of it, [83—57] that is McNiece that tranferred that contract to Cornell, those are both copies of the same contract.

Q. Well, Mr. Greco, did you make a contract with Cornell and Gross?

A. No, sir, I did not, it is the McNiece contract that applies to the Cornell shipment.

Q. You never shipped any goods to Cornell?

A. I don't recall, I don't think so, if they were shipped to Cornell they must have been billed to McNiece because it is the same transaction.

(Testimony of Victor V. Greco.)

Q. But you are not sure whether they were shipped to Cornell or not?

A. Whether they were shipped to Cornell or McNiece it is the same transaction as shown by that contract.

Q. Won't your books show?

A. Yes, sir, my books will show.

Q. Can you show the shipment that was made under the Cornell contract or the McNiece?

A. Yes, sir.

Q. Which book is that in?

A. It is a book right here.

The COURT.—Gentlemen, this must go on record in the proper way and let the examination be between counsel and the witness so that we will get it on the record.

Mr. LANNIGAN.—Q. Now, Mr. Greco, I find, on page 446 of your miscellaneous invoices from January 1, 1919, beginning on page 551—

A. (Interrupting.) Mr. Lannigan, the description on that book is wrong. I will explain it to you.

Q. This is simply for the purpose of identifying the book, that is all. This book which has on it what I read "miscellaneous invoices, etc." at page 446, at the top of the page what purports to be a bill, a statement?

A. I will explain what that is, what that book is, Mr. Lannigan, that book is an exact—

Q. Just a moment.

The COURT.—Just answer the question.

(Testimony of Victor V. Greco.)

Mr. LANNIGAN.—Q. Will you tell me what that entry on page 446 [84—58] at the top is?

A. This is an exact copy of the invoice of that particular shipment.

Q. Now, this, Mr. Greco, shows the shipment to J. M. or J. H. McNiece & Company of New York of 500 cases of Salsa de Pomidoro, 6 ounces at 7.35 a hundred less 1½ cash, net 3447.50? A. Correct.

Q. And under what contract was this shipped?

A. McNiece & Cornell.

Q. McNiece & Cornell?

A. Yes, the McNiece contract with the endorsement on the face of it in red ink that those goods applied to the Cornell sales that McNiece had made to Cornell.

Q. Then, did you deal direct with McNiece?

A. I dealt with McNiece and not with Cornell.

The COURT.—Q. Who is that contract with?

A. The contract is with McNiece.

Mr. LANNIGAN.—The contract purports to be with—it is impossible to tell, your Honor, because it says—the buyer is described as H. P. Cornell by blank, and written in ink over buyer is J. M. McNiece & Co. I will offer in evidence, your Honor, the contract dated April 11, 1916 purporting to be a contract between the Greco Canning Company and J. M. McNiece & Company, New York City containing a red ink endorsement and ask that it be marked Plaintiff's Exhibit No. 1.

Mr. McNAB.—What is the purpose of this?

Mr. LANNIGAN.—Well, the witness produced it.

(Testimony of Victor V. Greco.)

The COURT.—It is in connection with his examination. A. Yes.

Mr. McNAB.—It is one of the contracts as listed on my list, these goods were sold to McNiece, McNiece had evidently sold them to Cornell and the contract remained with McNiece and shipment made to McNiece. [85—59]

Mr. McNAB.—That is all written in red ink on the front of it?

A. Yes, right on the face of it and endorsement there.

Mr. LANNIGAN.—This contract, your Honor, is a contract between J. M. McNiece & Company and the Greco Canning Company for a thousand cases of Salsa D*i* Pomidoro, f. o. b. San Francisco.

The COURT.—What is the date of it?

Mr. LANNIGAN.—It is dated April 11, 1916.

The COURT.—The same year.

Mr. LANNIGAN.—Yes, sir.

Plaintiff's Exhibit No. 1 is as follows:

Plaintiff's Exhibit No. 1.

"CONTRACT.

San Jose, California, April 11, 1916.

THE GRECO CANNING CO., of San Jose, California hereinafter called seller, this day sold, and J. M. McNiece & Company, New York City, New York, hereinafter called buyer, this day bought the following described goods—1916 pack.

One Thousand cases Salsa De Pomidoro packed

200 tins to the case, six (6) oz. each, in wooden cases at Seven Dollars ($7.00) per case.

TERMS: The above named goods are F. O. B. cars San Francisco less 1½% cash discount. Sight Draft Bill of Lading attached.

GUARANTEE: Buyers guarantee full acceptance unless this contract is otherwise changed by mutual consent of both seller and buyer. Seller guarantees that the goods covered by this contract are not adulterated, mislabeled, or misbranded within the meaning of the National Food and Drug Act, June 30, 1908; or the California Pure Food Act, March 11, 1917. Seller is relieved from any responsibility for misbranding when goods are not shipped under sellers label. Quality to be of same consistency as the Imported, of good Flavor and color. Samples to be submitted prior to shipping and shipment to correspond with samples.

CONDITIONS: Goods at risk of buyer from and after shipment, although shipped to seller's order. In case of short pack, seller agrees to make prorate delivery only. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire, or other circumstances, beyond its control, such obligations shall at once terminate and cease. Usual swell guarantee.

Shipment to be made as soon as practical after packing. All goods remaining unshipped to be billed and paid for not later than November 1, 1916. Buyer agrees to pay said invoice on demand or to protect draft for invoice value on presentations. Seller agrees to store said goods and insure them

(Testimony of Victor V. Greco.)

[86—60]at buyer's expense, should buyer so desire, until December 1, 1916.

Seller: GRECO CANNING CO.,
By V. V. GRECO.
Buyer: H. P. CORNELL,
By ————————.
J. M. McNIECE & CO.,
(Written over "H. P. Cornell").

(Endorsed in red ink on face:)

"This order is intended for H. P. Cornell of New York, and will be filled on condition that these goods will be delivered to them at price stipulated in this contract."

Mr. LANNIGAN.—Q. Now, Mr. Greco, I show you what purports to be a contract between yourself and McNiece & Company?

A. Mr. Lannigan, it is the same contract, that is the same contract as the one you have, it is only an extra copy.

Q. Well, Mr. Greco, will you look at that and see whether it is a copy or not, I don't think it is?

A. Let me see the other one—my list please—I want a copy of it—McNiece 3000, this is one thousand—I beg your pardon—these are separate contracts. It is one for two thousand and one for one thousand, making a total of three thousand as shown on my list, the one thousand was intended for Cornell and two thousand to McNiece, but the shipments were made all to apply against both of these contracts as the contracts had been entered into with McNiece and not Cornell.

(Testimony of Victor V. Greco.)

Mr. LANNIGAN.—Now, I offer in evidence the contract dated April 11, 1916, between the Greco Canning Company and J. M. McNiece & Company for two thousand cases of Salsa D*i* Pomidoro, F. O. B. San Francisco and signed Buyer: J. M. McNiece & Co. by E. L. Heebner, and ask that that be marked Plaintiff's Number 2. (Tr., pp. 75 and 76.)

There was now offered in evidence and marked as Plaintiff's Exhibit No. 2 the following contract: [87—60A]

Plaintiff's Exhibit No. 2.

"CONTRACT.

San Jose, California, April 14, 1916.

THE GRECO CANNING CO., of San Jose, California hereinafter called seller, this day sold, and J. M. McNiece & Co., New York City, N. Y. hereinafter called buyer, this day bought the following described goods—1916 pack, future delivery.

Two Thousand cases Salsa D*i* Pomidoro packed 200 tins to the case six (6) oz. each, in wooden cases at Seven Dollars ($7.00) per case.

TERMS: The above named goods are F. O. B. cars San Jose, less 1½% cash discount, Sight Draft Bill of Lading attached.

GUARANTEE: Buyers guarantee full acceptance unless this contract is otherwise changed by mutual consent in writing of both seller and buyer. Seller guarantees that the goods covered by this contract are not adulterated, mislabeled, or misbranded within the meaning of the National Food and Drug

Act, June 30, 1906; or the California Pure Food Act, March 11, 1907. Seller is relieved from any responsibility for misbranding when goods are not shipped under sellers label. (Quality to be of same consistency as the Imported, of good flavor and color. Samples to be submitted prior to shipping and shipment to correspond with samples.)

CONDITIONS: Goods at risk of buyer from and after shipment, although shipped to seller's order. In case of short pack, seller agrees to make prorate delivery only. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire, or other circumstances, beyond its control, such obligations shall at once terminate and cease. Usual swell guarantee.

Shipment to be made as soon as practical after packing. All goods remaining unshipped to be billed and paid for not later than November 1, 1916. Buyer agrees to pay said invoice on demand or to protect draft for invoice value on presentation. Seller agrees to store said goods and insure them at buyers expense, should buyer so desire, until December 1, 1916.

Seller: GRECO CANNING CO.,
By V. V. GRECO.
Buyer: J. M. McNIECE & CO.
By E. L. HEEBNER." [88—60B]

Thereupon the cross-examination proceeded as follows: I am familiar with the practical operations of this machinery. I am not a mechanic, but I have had mechanical experience; have been connected with machinery since I was 18 years old.

(Testimony of Victor V. Greco.)

I am not an engineer. We bought this machinery from Mr. Krenz; he manufactured it. We began to have trouble with it as soon as we began to try it out, off and on. It appeared that the tubes in this apparatus were too small, that is, the radiating tubes were too small, and that this product, tomato pulp, had a tendency on account of the small size of the tubes to remain dead in these tubes and the heat around the tubes would scorch it. Had we endeavored to make a liquid product why then we would not have had that trouble, but due to the fact that we wanted to make a high class article because that was what we had sold and agreed to deliver, in concentrating it and leaving it in the pans a sufficient time to properly concentrate it, it would burn on us. It actually burned so hard that we had to drill it out. Sometimes it would take a half a day to do it. It all depends on how hard it had burned into these tubes. Absolutely we actually had to use an electric drill, an electric metal drill to get the stuff out. It happened from time to time, more frequently when the engineer would endeavor to turn out the product a little too thick, then it burned harder. If he would catch it just at the right time and turn out a more liquid substance, why, then, we did not have that trouble. The concentration of solid with Salsa De Pomidoro was about 24 per cent, about a concentration of from five to six to one. That all depends on the nature of the raw material. That made a very thick paste. You could turn a can upside down and it would not run out. You would have to get a spoon to take it out. It would not

(Testimony of Victor V. Greco.)

run; it was almost like putty. That is the real Salsa [89—61] de Pomidoro. There is nothing else in it but tomato, excepting basilico, when it is requested, and a little salt, no condiments of any kind, nor spicing. Sometimes we stayed up as late as 1 o'clock at night trying to fix it, and even later than that— one or two o'clock at night; not to try to fix it myself, but to watch my men to see that they would fix it. I took an interest in it to see that it was done. I stayed there as late at that time to see that the work was done or was being done. Nothing else went wrong with it besides this burning in the pipes, excepting a shortage of crop, if you are referring to that; nothing else was wrong with the machinery.

Mr. LANNIGAN.—Q. Did you ever have any trouble with the crusher, for instance?

A. Oh, yes, that was in the other machine, that is like any machine, you could buy an automobile and sometimes it goes wrong because your carburetor is clogged up, those are minor troubles.

Q. Did you have any trouble with the crusher?

A. Oh, we have them every day.

The COURT.—Q. That is simply incident to the ordinary operation, isn't it? A. Yes, sir.

Mr. LANNIGAN.—Q. Well, what proportion of the time, Mr. Greco, was this machinery in operation and working in good shape?

A. What proportion of the time?

Q. Wasn't it working in good shape most of the time? A. No.

(Testimony of Victor V. Greco.)

Q. It was not. A. No.

I will explain that in this manner, Mr. Lannigan: If the finished product that we were getting out of the apparatus was more of a liquid nature then our troubles were less. Any time that we wanted to improve upon the quality, try to get it back [90—62] to its proper consistency, then we had those troubles. Every time we wanted to make it thick enough, as thick as I would like it, we had that trouble. We ascribed that trouble to the tubes being too small. I did not know at the time that the tubes were too small; we finally learned. Experience taught us that the tubes were too small. As a matter of fact, our tubes now, in the present apparatus, we have doubled several times. We have larger tubes. We made that experimental Salsa De Pomidoro with an open kettle, a small kettle at home. In the making of Salsa the fruit is washed and assorted, crushed, pulped, the skins and seeds are eliminated, reduced to a liquid pulp; it is a pure paste, pure juice, pure pulp of the tomato concentrated. If you want to make a high-class product the concentration is five to six to one. In other words, out of six parts you would get one part; one part paste out of six gallons; you would make a gallon, or out of six pints, one pint; it was reduced that much by evaporation; it was one part solid to six parts water before. I have presented here a list of contracts and deliveries of Salsa De Pomidoro of the 1916 pack in cases. It was both made up by myself and under my supervision. It was made up by the bookkeeper, and I

(Testimony of Victor V. Greco.)

supervised it. The young lady bookkeeper is no longer in my employ. I helped to make it; I looked through the records with her, checked it up. I am sure of my own knowledge that it is complete. I checked up every item in the books. Out of the pack of 1916 I sold to no one except to the people that are listed in that list, and only one sale of two cases without any contracts, which are the two last cases on that list, locally sold in San Jose.

I do not recall the average tonnage per acre of tomatoes in the Santa Clara Valley in the season of 1916, but I think it was about ten tons to the acre. It varies very much seasonally. I [91—63] do not recall what it was in 1916; that is four years off. I might approximate it. I imagine in 1916 it must have been about seven or eight tons to the acre.

Mr. LANNIGAN.—Q. Now, as a matter of fact, wasn't it 9.5, Mr. Greco? A. I don't know, sir.

WITNESS.—(Continuing.) I have been in business in the Santa Clara Valley since 1913, packing tomatoes all that time.

Q. Did I understand you to say that sometimes it took five days and nights to clean out this machinery?

A. I did not say, sometimes, one time it took us five for one pan, but we were using the other one in the meantime.

Q. You were working all the while?

A. Yes, sir; because we had two of these apparatus, but one particular time it took us five days and five nights with a complete crew changing shifts to drill it out.

(Testimony of Victor V. Greco.)

WITNESS.—(Continuing.) Krenz installed the machinery, installed this apparatus, and then sent a man whom he stated was an experienced—the most experienced man that he had in the operation of a vacuum pan, to teach us how to operate this apparatus. We installed the machinery in July or August of 1916. Not only my men were not familiar with it before Krenz men came there to show them, but there was not another man in the United States who was, and Krenz himself was not familiar; it was purely experimental with him; he had never constructed an apparatus for the making of Salsa De Pomidoro. He did not construct this apparatus on our contract—on our order, yes. We got our heads toegther as to what apparatus close to what they were using in Naples from drawings that we had seen. We tried to duplicate what was being used in Europe; that is, Krenz, myself and other engineers consulted. Krenz made the machinery. He is not a tomato man; he is a [92—64] coppersmith, has a coppersmith establishment. These apparatus are all copper; he makes them for the sugar refiners and for the the milk condensers as well as for distilling alcohol.

I first discovered the fact that the crop of 1916 was going to be short as soon as I saw the first rain some time in October. I testified this morning that it was about the latter part of October, but having refreshed my memory from one of the letters that I have written, the letter stated the 12th of October so it must have happened about that time. I did

(Testimony of Victor V. Greco.)

not make any contracts for tomatoes outside of the Santa Clara Valley. I did not need to make any efforts to get tomatoes in any other part of California at the time we were trying. We entered into contracts for our raw material before the tomato plants were set, say about the month of January, and then it is January, February, March; they do not set them out until May. We made special effort to get tomatoes when we experienced that the acreage that we had, due to rain and frost, was insufficient in all parts of the State. We found out that the acreage was insufficient, due to rain and frost, I would say, some time in October. There was no frost as early as that, but there was the rain and the blossoms, the new—the other setting had dropped off on account of the rain and we could see that the tonnage was going to be considerably decreased.

We tried to get these tomatoes all over the country, all over California, where they are grown, Manteca.

Q. With whom did you deal in Manteca?

A. Sent our buyer out.

Q. What firms did he approach in Manteca?

A. Firms do not sell it, he had to go to the farms.

Q. What farms?

A. Several farms around there that were growing [93—65] tomatoes.

Q. Do you know who they were?

A. I couldn't recall their names.

The COURT.—Q. Where is Manteca?

(Testimony of Victor V. Greco.)

A. Manteca is in the San Joaquin Valley near Stockton.

Mr. LANNIGAN.—Q. What was the name of the buyer? A. Mr. S. Ortolano.

Q. Where is Mr. Ortolano now?

A. In San Jose.

Q. Is he in your employ? A. Yes, sir.

WITNESS.—(Continuing.) We also made an effort to get tomatoes in San Francisco. I sent a man out to investigate in the markets, if there were any available tomatoes, but could not find any. I did it myself, at times came up myself. I couldn't deal with anybody. I looked around on the market and could not find anything that was suitable except half a dozen boxes and twenty elsewhere that were insufficiently ripened, at the commission houses.

Q. Do you recollect anyone of them that you tried to deal with?

A. With all of them, I made a canvass, I stated, canvassing the commission district.

Q. I am asking you if you will just tell me the name of somebody that you attempted to get tomatoes from in that year?

A. I looked at their product, what they had there, and none of it suited, I had no reason to make any arrangement with them.

Q. You did not try to deal with them?

A. There was nothing to deal with, there was no product there, at the market in the commission district on Washington Street. I mean there was nothing that exactly suited my purpose because they

(Testimony of Victor V. Greco.)

do not make a specialty of supplying canneries; they get the overflow of canneries.

Q. Where else did you make an effort to get tomatoes?

A. Around the Santa Clara Valley, different farmers, and found that [94—66] the different farmers had contracted their acreage with other canneries and there was none available.

The COURT.—Q. You said that there were other canneries and manufacturers that had to prorate, too?

A. Yes, sir, but I was the only one in the Santa Clara Valley that was producing Salsa at that time, I was the pioneer in California.

WITNESS.—(Continuing.) If I am not mistaken the California Packing Company prorated that year, and the Pyle prorated. The California Packing Corporation have 53 plants all over the State of California and Washington. In the Santa Clara Valley they have two, in Santa Clara and in in San Jose, my own town. They are larger packers than we. They are a $25,000,000 institution. I have never had any access to their records, but from published reports I have learned that they prorated, reports published in the magazines of the canning trade.

Mr. LANNIGAN.—Q. In your letter of October 12th, Mr. Greco, you stated that you were having trouble with your machinery, was that the first time that you had told Mr. Pastene that you were having trouble with the machinery?

(Testimony of Victor V. Greco.)

A. I don't recall whether it was in that letter, Mr. Lannigan.

Q. Well, there is nothing in the correspondence prior to that date with regard to the machinery?

A. Well, I believe that letter stated that I had trouble with the rains, if I ain't mistaken.

Q. So it did, it stated that you also had trouble with the machinery, what I am asking you is, did you tell him before that time that you had had any trouble with the machinery?

A. Maybe I did not.

WITNESS.—Continuing.) According to our records, the last day we packed Salsa was on November 18th. That is the last day we [95—67] handled tomatoes or packed tomatoes. I do not recall whether we were operating on Salsa or tomatoes on that day, but about that time we stopped packing, because we were handling both, peeled tomatoes in cans and Salsa. We put up peeled tomatoes, canned tomatoes and sauce besides.

The COURT.—Q. Can you show from your books, what the size of your solid pack was and how much other product you put up?

A. Your Honor I could show it by segregating those deliveries that are shown in the sales book.

Q. Well, you look into that between now and tomorrow morning so that you will be able to tell us what your entire pack was, that is, what amount of tomatoes were used by you in your entire pack.

A. Yes, your Honor.

Q. And what your acreage was?

(Testimony of Victor V. Greco.)

A. Yes, your Honor. (Tr., pp. 87 and 88.)

The witness being asked if he sold any pulp during the season of 1916 to anybody else in the Santa Clara Valley, explained that certain tomatoes are reduced to puree and that some buyers call that pulp, and others will call it a puree.

Q. Did you sell any of that?

A. I think we did, because we have some of that every year.

WITNESS.—(Continuing.) I do not recall whether we sold any tomatoes, raw material to anybody. I might have because this is what happens: We all buy from each other during a period at the very peak when one man might be stuck and I have not sufficient he will give me his surplus or vice versa. If that took place in that year it is possible that I did, but I don't recall. If I made any sales they will show in the book. [96—68]

Q. Will you go through that book and be prepared to tell us to-morrow whether or not any sales of tomatoes, that is to say raw material, were made during the season of 1916 by you to anybody?

A. Before I will answer that question, I want to ask Mr. Redding, the auditor, if he is able to get that information out for you by to-morrow morning.

Mr. McNAB.—Well, we will get it if it is possible to get it." (Tr., p. 89.)

Mr. LANNIGAN.—Q. In your letter of December 26, 1916, addressed to Pastene & Company you said, amongst other things, "In the beginning of the season we thought that we would succeed in packing

(Testimony of Victor V. Greco.)

about a 50 per cent delivery, but we regret to advise that we did not succeed in doing so." What made you think, in the beginning of the season, that you would succeed in packing about a 50 per cent delivery?

A. Well, I suppose that I had in mind the beginning of the season about to be, October, the time I was writing, which was usually about the first part of the season, in other words I didn't mean to say the beginning, about the first part of the season.

WITNESS.—(Continuing.) We began to pack about the 6th of September. The wording in that letter—what I meant was, during the early part of the season. It was a mistake in putting it "beginning of the season." The rains that we had is what made me think it at that particular time. When I wrote that letter the word "beginning" was wrong. I meant the early part.

The COURT.—Q. What made you think the early part?

A. That I would only make a 50 per cent delivery?

Q. Yes. [97—69]

A. The troubles with my machinery and then the subsequent rains. The troubles that I was realizing with the machinery and the rains that were apparent early on us and the setting of the blossoms on the plants did not show up well, why, I formed that conclusion.

WITNESS.—(Continuing.) Mr. LANAGAN.—Q. What was the total tonnage of tomatoes and to-

(Testimony of Victor V. Greco.)

matoe products that you packed in the season of 1916?

A. (Tr. p. 90.) The total tonnage of tomatoes and tomato products that was packed in the season of1916 does not seem to be extended here, but they could be computed very readily because we got the entire daily record of all the number of boxes and weights of the tonnage that we used from day to day during this whole season. I am going to try to have that computation done. I cannot promise you that I will make it because I won't have the time. I got tickets for Tetrazinni tonight. (Tr. p. 90.)

Mr. McNAB.—We will have that computation made to-night if it is possible to get through on time.

WITNESS.—(Continuing.) I have no recollection of how many cases of solid pack I contracted to sell from the 1916 pack. The books will not show what we had contracted, but it will show how many deliveries we made. We have the contracts, but not here.

Mr. LANNIGAN.—I will ask that those contracts be produced. [98—69A]

The COURT.—Yes, produce those contracts, not only for that, but for your acreage too.

WITNESS.—(Continuing.) I do not recall how many cases of tomatoe sauce I contracted to sell from the pack of 1916. We must have the contracts.

We pack the solids and standards. The standard is a lower grade, not more water in it, but juice. Sometimes extra standard.

(Testimony of Victor V. Greco.)

The witness here described standards and grades, puree, pulp, and trimmings, and described the methods used in the manufacture and the amount of concentration in the various packs.

The witness thereupon stated in response to counsel's request that he would endeavor to produce his contracts for 1916 if they could be found, and the examination proceeded:

WITNESS.—(Continuing.) These contracts are usually made out before the season commences. I could not say that they were all made before the season commenced. Referring to those relating to Salsa, those were all made prior to the season, absolutely. They were all made about the time that Pastene's were made, that is, about April and May, and maybe June.

Besides Manteca and San Francisco I endeavored to get tomatoes in the season of 1916 in our immediate vicinity.

Q. In your immediate vicinity. Anywhere else?

A. No, sir.

Q. In your letter of January 5, 1916, when these negotiations were commenced, Mr. Greco, you said, amongst other things, "We are very familiar with the method of making this article"—referring to the Salsa de Pomidoro. Will you explain what you meant by that? A. I knew how to make it.

The COURT.—Q. Did you know the instrumentalities that were employed in its manufacture?

A. Not on a large scale, your Honor, that is, I

(Testimony of Victor V. Greco.)

knew that it required a vacuum cooking [99—70] to make a high-class article, but I didn't know the workings, the construction of a vacuum equipment apparatus, but you can make it on your kitchen stove.

They were using the vacuum apparatus in Italy.

Mr. LANNIGAN.—Q. Isn't it a fact that in 1916 and before that time the Italians made this by sun drying and so on, and didn't use any vacuum apparatus at all?

A. No, sir, you are misstaken, that is not the product that you are referring to as sun dried. That is a conserva, that is more highly concentrated, a 15 to 1 concentration. That is not Salsa De Pomidoro. Salsa de Pomidoro was made in Italy with the vacuum system.

The COURT.—Q. Did you make any 16 to 1 concentration?

A. Oh, yes, about 15 to 1, 12 or 15 to 1.

WITNESS.—(Continuing.) I found out they were making Salsa de Pomidoro with vacuum pans. There was a report by Mr. Shriever of the Department of Agriculture of the United States Government that dwells on it. He made a special study of the Italian industries pertaining to the making of Salsa. I read that with considerable interest. Mr. Krenz and I got our heads together and devised the apparatus for the concentration. Krenz built it and installed it. That was in July or August 1916, that is, the installation of the plant. The contract had been entered into with Krenz

(Testimony of Victor V. Greco.)

much earlier. He had to construct these pans, build them.

I do not remember what percentage of deliveries of solid pack we made in 1916. The book I referred to before will show the actual deliveries. I do not remember whether we were able to fulfill our contracts or not. To be frank, I do not remember whether they were 50% or 100%, and I do not remember about the tomatoe sauce, whether 100% for them or not.

The reason we were slow in getting samples to Pastene was [100—71] because we wanted to be sure to get the samples out of the stuff that we intended to ship them. I think we shipped to somebody else before to them. The samples we finally sent were samples form the 665 cases that were delivered.

Mr. LANNIGAN.—Q. In your letter of October 21, 1916, Mr. Greco, you state, in effect, that you were having trouble with your vacuum apparatus and were operating it at about 25 per cent. Now before that time, did you operate this machinery at more than 25 per cent efficiency or less?

A. It was very irregular.

It would be impossible to state what percentage of efficiency, as I explained that. I cannot even approximate it, because there were no two days—it depended on the consistency of the stuff, if we were—

The COURT.—(Interrupting.) Q. Didn't you try to make it the same consistency all the time?

(Testimony of Victor V. Greco.)

A. No, your Honor, we were endeavoring at all times to perfect it to that point of heavy consistency, and naturally what would happen we did—as soon as they feared that it was going to burn in the tubes, they would run it out. Then the next batch would come along. Well, let's try again to get it to the proper consistency, and they would partly burn the tubes, then there would be a total of two or three hours cleaning those tubes, then another batch, probably they endeavored again to get it to a higher consistency and they would totally burn it, as I stated before they were five days cleaning out the tubes.

Mr. LANNIGAN.—Q. Now, Mr. Greco, what did you mean, did you mean that you were operating this apparatus on about October 21st, that very day, at 25 per cent efficiency, is that what you meant?

A. Well, what I mean I imagine was operate it as a whole, considering [101—72] the time that we had lost with the apparatus, at that time it would be about 25 per cent.

Q. Now, I will ask you, Mr. Greco, what you meant by the words "we are now operating this apparatus at about 25% capacity"?

A. Just exactly what I wrote.

Q. You meant that on that day you were operating? A. No, not on that day, about that time.

Q. That you were getting 25%.

A. I might have just the day I wrote that letter, we might have been running 10% or 40%. We kept no record exactly of the percentage that we

(Testimony of Victor V. Greco.)

were getting. We got this percentage, judging from finished product, I knew that I was to turn out so much and I was not doing it.

Q. Judging by the finished product at the date prior to October 21st how much efficiency were you getting out of it approximately, were you getting 25 per cent or 50 or 75?

A. I don't know. I haven't any idea.

The COURT.—Q. About what time did you make this shipment to the New York house of 500 cases on 1000.

Mr. McNAB.—I can get you the date, your Honor.

A. That was 500 cases on 3,000, your Honor.

Mr. McNAB.—October 30th they were shipped, the order for the shipment.

A. No, Mr. McNab, you looked up Pastene's.

The COURT.—Q. I say, what time was it that you sent this shipment of 500 cases to the New York house?

Mr. McNAB.—Oh, yes, I did not have that.

A. That is in the book, McNiece.

The COURT.—Q. You stated this morning that that was one instance where you had delivered 50 per cent.

A. No, your Honor, that was a New Orleans instance, where there [102—73] was 200 on the contract and 100 cases shipped, the 500 cases to New York as against a contract of 3000.

The COURT.—Yes, I guess I was mistaken about that. (Tr., pp. 99 and 100.)

(Testimony of Victor V. Greco.)

Q. Now, if along about October 21st you were getting approximately about 25 per cent, was the machinery in the vacuum apparatus working better or worse than it had been.

A. The same way.

Q. You mean to say that you got about 25 per cent right through the whole season on an average?

A. No, on an average less than 25, on an average of the whole season I only got 19.2%. As to the efficiency of the machines, that is my efficiency; 19.2% was all I was able to produce. That is all I got out of that machinery, due to defects in the machinery and to inability of securing sufficient raw material. I figured the capacity of the machinery at the beginning of the season to be about 30,000 cases for the season of 200 tins each. We contracted to sell 18,930 cases.

Q. 18,930 cases was the total? A. Yes, sir.

Q. How many tons of tomatoes would it have taken to produce 18,900 odd cases?

Mr. McNAB.—Q. You mean all of one product, solid pack?

Mr. LANAGAN.—No, we are talking about the Salsa di Pomidoro, of course.

Mr. McNAB.—You are figuring only on Salsa di Pomidoro?

Mr. LANAGAN.—That is all.

A. It would have taken about 2800 tons if I have not made any mistake in my computation, about 2800 tons. [103—73A]

Q. You don't know how many cases of solid

(Testimony of Victor V. Greco.)

packs or standards that you sold in 1916?

A. I don't know it now, no, I don't recall that, I didn't prepare that information.

Q. You are going to find that out from your records? A. Yes, sir.

Q. And be prepared to testify on that point. Your Honor, if I may reserve the right to go further into this vital matter of a short pack, that is to say, tonnage and acreage.

The COURT.—You will have an opportunity to continue with your cross-examination when he has informed himself of these things that he cannot testify to now.

Mr. LANAGAN.—Yes, with that understanding, that is all for the present.

Mr. McNAB.—There will be not the slightest objection on our part to that. (Tr., pp. 100 and 101.)

Redirect Examination.

When I said that the product known as Salsa De Pomidoro could [104—73B] be made on a kitchen stove, I meant in an experimental fashion and not as a practical commercial proposition.

The COURT.—Q. Well, lots of Italians in Italy do make it right on their own stoves for their own use and for sale among their neighbors, isn't that a fact, this same sort of sauce. I don't know whether they call it Salsa De Pomidoro or whatever you call it?

A. No, what you are referring to is the Conserva that they make to distribute among their neighbors because they cannot make the Salsa de Pomidoro

(Testimony of Victor V. Greco.)

in their kitchen stoves and preserve it because they have got to have canning machinery, if it is not hermetically sealed it will not keep, but this other product, the Conserva, does keep, that is so dry, has so much solid to it that it does not require any hermetically sealed package.

Q. It is preserved by the salt?

A. By the salt and its high concentration.

WITNESS.—(Continuing.) I can give you an approximate figure within my best recollection, an estimate of the acreage which I had under contract in the way of raw product in 1916 in advance of looking up contracts. I think I could recall the various firms. The contract for delivery to McNiece or the two contracts with McNiece which have been introduced in evidence by the plaintiff, the percentage of those contracts I was able to supply was 16.7. I was under contract to supply 3000 cases, including the Cornell contract that Mr. Lannigan refers to. That is 3,000 cases, exactly the same amount as the order of the plaintiff in this case, and to that party I delivered 16.7 per cent.

Q. Could you have produced a more liquid product from this machinery?

The COURT.—He has gone into that several times that they could and would not have had the trouble and all that. He said [105—74] concentration is what produced the trouble.

Mr. McNAB.—Q. When you were discussing this matter with Mr. Pastene, and prior to the entry into the contract, what conversation occurred be-

(Testimony of Victor V. Greco.)

tween you, relative to machinery and methods of manufacture, if any?

A. Mr. Pastene seemed to have been very favorably inclined and seemed to know something about the machinery itself, that the vacuum equipment produced a better quality of material, stating that his best deliveries from Europe, the brands that were best came from Naples, and from Palma, two districts where they had modernized their plants and put in the vacuum equipment, while the product which came form Sicily which was concentrated in a large open kettle did not produce as good a quality of material, and he was very much satisfied to see—to learn rather that I was aiming to put in that class of equipment.

WITNESS.—(Continuing.) There was nothing said between us respecting the installation of any particular form of machinery, or whether such machinery was to be had in the United States. There was no manufacturer in the United States who was producing any commercial quantity of Salsa De Pomidoro. There was a reference made between us to the fact that I was pioneering in this business.

When I tried to get tomatoes elsewhere, as I have testified, I sent to Manteca. It was not a very large tomato producing community at that time. They began to develop those farms there and producing tomatoes more so since. It was in its infancy at the time. I made numerous efforts continuously in the Santa Clara Valley to get

(Testimony of Victor V. Greco.)

tomatoes. I made inquiries from place to place.

Q. Do you know of any places at all in the State of California where you could have obtained any tomatoes suitable for your purposes?

A. They were not obtainable. [106—75]

WITNESS.—(Continuing.) When I alluded in my letter of October 21st to a 25 per cent capacity, it was an approximation based on the time that had elapsed and the product that we had already succeeded in producing as our records of shipment.

Testimony of Milton M. Berne, for Defendant.

MILTON M. BERNE was thereupon called as a witness on behalf of defendant and testified as follows:

I live in San Francisco. My business is canned goods and dried fruits broker. Prior to engaging in the brokerage business I was in the wholesale grocery business. I have been in both those businesses 21 years. During that period of time have been engaged in the business of dealing in tomato products. Corresponded with associated brokers throughout the United States in order to learn conditions in other tomato producing sections. I know of my own knowledge that the packing and canning trade has applied a definite and distinct meaning to the phrase "short pack." Short packs may develop from any one of a number of causes; a short pack may be occasioned by crops failure or poor crop; it is also oftentimes occasioned in the case of an individual canner by that individual

(Testimony of Milton M. Berne.)

canner's misfortune, as for instance some mishap in his plant; let us say that he might blow out a cylinder head in the apparatus and during the height of the packing season would have to shut down his plant for a period of two or three weeks. That would result in his individual plant having a short pack whereas other packers might have made a full pack. When the canners league drew the contract covering the list of California canned goods those things were considered and the contract is supposed to take care of short pack under that definition. The term "short pack" is not synonymous with "short crop," but it is more extensive. [107—76]

Q. Is the term short pack applied only to a locality or is it applied to the individual packers? What I mean by that is this, suppose there should be a large crop in any given section in which the canners are located but through individual misfortune one of the packers is unable to fulfill all of his contracts without negligence on his part. What is the rule with regard to the construction of the term short pack?

A. As accepted by the trade it would not be considered short pack, if there was a large crop, and all the canners made full delivery, or nearly full delivery, it would be considered that there was a full pack or a good pack, not a short pack.

Q. But if the individual packer through misfortune in his cannery, break down of machinery, inability of the machinery to work right, should

(Testimony of Milton M. Berne.)

be unable without wilful misconduct on his part to fill his contract, and would be required to prorate, is that or is that not considered justifiable short pack?

A. Yes, for his individual case it is considered short pack, and we have always presumed that the Canners League contract has protected such canners in such contingency. The trade recognizes the right of the individual packer who through misfortune in his plant or otherwise has been unable to produce the full pack, to prorate under those conditions. A canner may sell, for example, to half a dozen buyers a thousand cases say, or say 6,000 cases; he may only pack 4000 cases, and you get your result for delivery to each individual buyer by dividing 4000 cases by six. I know about the packing conditions in the Santa Clara Valley in the year 1916. Those conditions were poor, owing to late frost, and I think it was Sunday, May 7th, one of the latest frosts we ever knew in California, damaged the young growing tomato plants which had to be replaced by other plants from the hot beds; there were insufficient [108—77] young plants in the hot beds to replace the acreage, which curtailed the tomato crop in the valley that year; that however, would have been a minor misfortune had not the general growing conditions throughout the remainder of the season from May on been unfavorable for growing tomatoes; the conditions throughout all of the producing sections of the United States in 1916 were poor, and the eastern

(Testimony of Milton M. Berne.)

states drew very heavily on California for their supply of canned tomatoes. Excluding the Santa Clara Valley the crop conditions in 1916 for the tomato crop of California were poor. There was a general short pack of the crop of 1916 not only in the Santa Clara Valley but in California, due to poor growing conditions, bad weather and such. The frost I have been speaking of occurring in May was a frost affecting the young plants which required replanting, thereby getting a later start, but they subsequently put in new plants which made the crop, much of the crop, late that year; you see the plants which survived the frost came along and produced tomatoes at a normal time, which we will say the middle of July for canning purposes, but the plants which were killed were consequently that much later and their yield was reduced. That is, they did not mature. I am slightly familiar with the product known as Salsa De Pomidoro. It is practically a new domestic product, in the United States.

Q. Now, Mr. Berne, assuming that a factory has installed machinery for the purpose of producing a tomato product and either due to the defects of the machinery or failure to perfect it in accordance with subsequent developments it fails to operate, notwithstanding the utmost efforts of the packer and thereby he fails to produce the amount that he expected to fulfill his contracts with, does the canning trade, or does it not, recognize that as any cause of short pack?

(Testimony of Milton M. Berne.)

A. The trade looks upon that as a condition [109—78] over which the canner has no control and recognizes a certain right of the canner who is unfortunate to make a short delivery. That is, in making short packs, to prorate, if his contract so provides.

Cross-examination.

The contract under which the Canners League is now operating was prepared in April, 1918; that is, it became effective, I think, then. You will find the date printed on it. I was in the tomato business in 1916 for a part of the year, up to September. We had no short deliveries made up to September in that year.

Q. Will you tell me what packer that you know of has made a short delivery on account of a break down in machinery?

The COURT.—Any instance that has fallen under your observation.

A. None that I can recall now.

Mr. LANAGAN.—Q. You can't remember anybody that ever did that? A. No.

Q. Where did you get the information that a break down of machinery would be recognized as a legitimate cause of short pack?

A. In my experience in selling the products of the various canneries there have been many causes for their prorating deliveries, prorating sales; there are a multitude of excuses that are offered by canners.

Q. I am not asking about the excuses they offer

(Testimony of Milton M. Berne.)

because that will cover the whole business of the world, and you know it.

The COURT.—Just what will be considered as legitimate [110—79] for bringing into the trade the term "short pack."

Mr. McNAB.—In other words, what excuses are accepted by the trade.

Mr. LANAGAN.—That isn't the question I asked at all. A. Will you repeat the question.

Q. Repeat the question, Mr. Reporter.

(Last question repeated by the reporter.)

A. Nobody gave me the information; that is my opinion. (Tr., p. 110.)

Redirect Examination.

The question of breakdowns of machinery has never to my knowledge arisen before in the fulfillment of any contract. A short crop, short deliveries by growers, any cause beyond the control of the individual canner, strikes, fires, are causes of short delivery.

Q. I suppose that is during the season, that in the critical point in the season, if the plant were to be burned, or seriously injured by fire so as to make it impossible to carry on operations that would be regarded as one?

A. Yes, that would be a cause for either prorate delivery or none at all.

WITNESS.—(Continuing.) Prior to the adoption of the standard [111—79A] packers' or canners' league contract, the substance of its statements were accepted by the trade as governing their

(Testimony of Milton M. Berne.)

actions. Prior to the adoption of the contract, effective April 1, 1918, we had another Canners' League canned fruit contract which is also adopted by the Canners' League, but this contract of April 1 is a reconstruction of the old contract. This is the latest. But regardless of the contract which they may have developed through this process into the present contract, my statement of what is understood by the trade as short pack applies over those years regardless of any contract. I have been 21 years intimately connected with the business.

Mr. McNAB.—Q. Now, I will ask you the question as an expert in the matter, assuming that a contract had been entered into by one of the parties to this action for the production of a product known as Salsa De Pomidoro which was a domestic product, was a product which had not theretofore been manufactured in America, and the party agreeing to deliver the goods for the first time installed machinery for its manufacture which had theretofore never been used for that purpose, and with competent and skilful and capable engineers operated it as skilfully as you could during the period of the season and was unable on account of the choking up to produce the required amount for his delivery, would that be accepted by the trade as a justifiable reason for prorate delivery of the short pack?

Mr. LANNIGAN.—I object to that question in that the hypothetical question does not agree with the facts in this case. (Stating reasons.)

(Testimony of Milton M. Berne.)

The COURT.—The trouble with the question is that it does not call for expert knowledge at all; it is not a subject matter according to the witness' own statement that has ever fallen within his [112—80] observation.

Mr. McNAB.—Does your Honor sustain the objection to it?

The COURT.—Yes.

Mr. McNAB.—I save an exception.

Which exception the defendant hereby specifies as

DEFENDANT'S EXCEPTION No. 2.

A second question having been propounded to the witness respecting breakdown of machinery, the Court said:

The COURT.—Q. Have you any instance in your mind of that kind, has it every occurred, to your knowledge? A. No specific instance.

Q. You know of no instance?

A. Not that I can recall now.

I know of no instance where the trade has been called upon to put its construction upon the effect of such a cause.

WITNESS.—(Continuing.) I do not know whether or not regardless of whether it has been called upon to rule upon a specific instance the general condition which I have been describing, the breakdown of machinery, troubles with machinery and the like, has been discussed by the trade.

Q. In the year 1916 were the conditions in the Santa Clara Valley more severe climatically than they were in other parts of California?

(Testimony of Milton M. Berne.)

A. No. It was general. 1917 was a better year; 1918 was a better year. We have had two poor years, 1913 and 1916. Outside of that we have had, as far as tomato crops are concerned, normal crop. The crop in 1916 was very much poorer than the crop of 1919.

Recross-examination.

Mr. LANAGAN.—Q. What was the average tonnage of tomatoes produced per acre in the Santa Clara Valley in 1916? [113—81]

Mr. McNAB.—Do you want to test the witness or is this for the purpose of information?

Mr. LANAGAN.—Both.

Mr. McNAB.—If you want the information, we accept whatever *you there.*

Mr. LANAGAN.—Q. Do you know?

A. I don't know.

Q. Do you know what it was in 1917? Was it more or less in 1917 than in 1916, Mr. Berne? (Tr., p. 116.)

I am more familiar with the selling of the finished product than I am with the growing and the manufacture of the product, although I do keep in touch with both those ends of the industry merely as a matter of information for the purpose of helping sell the finished product. I cannot tell you what was the average production of tomatoes per acre over a period of about 5 years from 1913 to 1918, inclusive. I of course know about what it is, but I am not competent to deal with that end of the business, the production end. I do not know that

(Testimony of Milton M. Berne.)

the average production in the Santa Clara Valley in 1916 was 9.09. That would be a fair average production. Outside of the Santa Clara Valley they grow tomatoes in Alameda, San Joaquin and Sacramento Counties, and many of the southern counties around Los Angeles, also Sonoma County around Santa Rosa.

I said 1913 and 1916 were the bad years, if my memory serves me right. I am not exactly certain of it, because I came here unprepared to testify. I know that the average production in Santa Clara County was low in 1913. It was better in 1916 than in 1913. It was better in 1917 than in 1916. I am not familiar with the statistics which you are asking me about.

Q. Is it not a fact that you do not know whether it was better in 1917 than in 1916?

A. May I answer in my own way? [114—81A]

Q. I want you to answer my question: Is it not a fact that you do not know whether it was better in 1917 than in 1916; isn't that true?

A. Yes, it is true.

I am basing my statements as to the results of the crops of 1913 and 1916 upon my dealings with the packs, not with the growing conditions—with the selling of the pack. Regardless of whether the average production per acre is correct or not, in view of the climatic conditions, the acreage is very often reduced.

By consent of counsel for the defendant the plain-

(Testimony of H. T. Rigg.)

tiff at this [115—82] point called in rebuttal and out of order—

H. T. RIGG, who testified as follows:

Testimony of H. T. Rigg, for Plaintiff (In Rebuttal).

In the year 1916 I was in the employ of the Greco Canning Company. I have heard the testimony given in this case. I ran the machinery they have been talking about, commenced to run it about the middle of October. A man named George Taylor was running it before I got there. He was a man that came up from the Krenz Copper Works. He showed me partly how to run the machinery. From that time I was in charge of running this machinery. Had very little trouble at first. We were running day and night. We ran about a week or ten days. After that we ran day shifts on to the end of the season. From about a week or ten days after the time I took charge on to the end of the season, we worked only in the evenings, extra overtime. Did not run all night. I kept a slight record of the time. I have it with me, daily report. The day I commenced I haven't got down here. The day I commenced keeping this diary Mr. Krenz asked me to make a report for his benefit, so that he could get the capacity of these pans, the vacuum system. The first date is October 10th when I began this report. That day I was delayed two hours and ten minutes on account of the filler or the pulper. It choked up. The pulper is the thing that skins and seeds the tomatoes. Also No. 2 pan stopped. That is one of

(Testimony of H. T. Rigg.)

the vacuum pans. We stopped one at a time for cleaning out. The tomatoes were plugged up in the tubes. We finished work with this paste machinery for the season November 28th.

The COURT.—Q. Can you tell from your books the time that you really did run it day and night?

A. Not exactly, for the simple reason that it was two or three [116—83] days after I started the day shift when Mr. Krenz came up and asked to keep this report. I do not exactly know whether it is 2 or 3 or 4 days. I went there and commenced running about the middle of the month. I started a little earlier than the 10th, in the early part of the month. Finished November 28th.

During the time we were running the paste line I had a conversation with Mr. Greco. I told him that we were not going to get out what we had contracted to do. We were not going to be able to fill our contracts, and he said, maybe not, but he said if we can get 20 per cent, we will be all right anyhow. Further than that I had no more conversation about that.

There was no time that we did not stop altogether. There were times when we ran along short on account of green tomatoes coming in and we could not use them for making sauce. I think that occurred twice. That was right after the rain began. The rains began the 2d of November. There was rain the latter part of the month of October once in a while. There would be a little shower, but it did

(Testimony of H. T. Rigg.)

not amount to much. The serious rains commenced the 2d of November. There did not any green tomatoes come in but stopped us from packing for about 3 days because we could not get into the fields to haul them out. On November 18th we did not run very much through the vacuum pans on account of green tomatoes. I see no instance before that. That is all I see here.

I worked a year before that for Mr. Greco at the same place. From what I could see we had a fair crop. I do not think I heard any talk or discussion there about the pack being short. They had plenty of tomatoes until the rain came and that kind of shortened them for a few days. That was in November. I do not remember of any rains in October; probably a little sprinkling, but it did not hurt anything. There was no frost that I remember of [117—84] until the latter part of November. I was not there in May. I was in town but I was not working at the cannery, but I did not pay any attention to whether there was a late frost or early frost that spring. The cannery is right in San Jose.

Cross-examination.

I began keeping this report October 10th. I do not know exactly the date I went to work. Kept the record at the request of Mr. Krenz. Sometime early in October I went to work. I do not know where the man went who had been operating the machine before me, but he quit and went to work

(Testimony of H. T. Rigg.)

somewhere else, I suppose. I do not know of my own knowledge.

I have a record of the number of times we had to stop on account of the machine choking up and the like. I have not called attention to that because I was not asked.

Mr. LANNIGAN.—We might save time. It is not our contention at all that this machinery worked. We admit it did not work, that they had an awful lot of trouble with it. We are not trying to show that the paste line actually did work.

The COURT.—That is true enough but they have their theory of the case and until it is determined it is an erroneous theory they are entitled to present their case along those lines.

Mr. LANNIGAN.—I did not mean to object; I merely wanted to say we might save time, and admit the machinery did not work.

The WITNESS.—(Continuing.) October 10 we were delayed 2 hours and 10 minutes on account of the pulper, that is, the machinery on the lower floor. Then we were delayed 2 hours cleaning the pans, No. 2 vacuum that same day. The delay of the pulper necessarily stopped the vacuum. There is a continuous feed from the pulper to the vacuum. There was a total stoppage on that day [118—85] of four hours and ten minutes. The interruptions in the two different parts of the machinery occurred at different times so that made it four hours and ten minutes. The next record shows that we that day stopped ten minutes for the cooker. That is on the

(Testimony of H. T. Rigg.)

other end of the machinery. And on the 11th we started at 6 A. M. in the morning and stopped at 9:20 in the evening and stopped two hours for the pulper again. Stopped another hour and 30 minutes for lunch. Then we stopped two hours again to clean No. 2 vacuum pan. This was on the 11th. On the 12th No. 1 pan stopped 23 hours for cleaning. This 23 hours carried us into the night. We worked during the night cleaning the pans. Mr. Greco was there off and on around where I was working. I cleaned it out by using an electric drill. The product had so caked and burned inside of the tubes that it had to be drilled out by an electric drill and it took 23 hours to do it. On the 13th we stopped one hour on the filler. Anytime anything occurred in any of the machinery it stopped the vacuum pans, just on either side of them, where the fruit came to the vacuum pan and where the vacuum pans had discharged. On the 14th started cooking at 6 A. M. and stopped 5 hours and 30 minutes for the sealer. That has something to do with the vacuum plant. It is not attached to it.

The court and witness here indulged in a colloquy relative to the machinery, and the witness proceeded as follows:

All of those machines that I have mentioned are connected with the pans, because on the other side we could not get the material for the pans if that machinery did not work, and on the other side could not take it away. The vacuum pan stops the whole of the machinery.

(Testimony of H. T. Rigg.)

Q. Was it a part of the installation that was devoted exclusively to the production of this stuff?

A. Yes. [119—86]

Q. That is what I am talking to you about. I am not confining it to the vacuum pans, but I say the installation that was devoted and put in there for producing this product that you are talking about.

A. These machines are all put in for that purpose.

Q. I am asking you, Mr. Witness, to give us those interruptions.

Mr. McNAB.—You were down to October 14th. Commence from there on. There was 5 hours and 20 minutes on October 14th, what was next?

WITNESS.—(Continuing.) On the 15th we stopped an hour and 10 minutes for the sealer. On the 18th we ran straight through 10 hours. We were not running night and day then. On the 19th we stopped 2 hours for the cooker. On the 20th we stopped an hour for the sealer; that is the canning machine. On the 21st we stopped 1 hour and 45 minutes for the same reason. This sealer was installed as a part of the same plant. It was built for the purpose of sealing the Salsa De Pomidoro cans. It was built on the same principle, but only for that one-sized can. It was not a machine such as have been used for years in the canning industry. The machine was built especially for that purpose, but the principle of the machine was something that was known and used in the canning industry for a long time.

(Testimony of H. T. Rigg.)

On the 22d we stopped 7 hours for the cooker, just an ordinary cooking machine. It was a large metal box and it has a cylinder inside where the cans fell through continuously cooking as they revolve. It was cooked again after the can was sealed. That is a usual and ordinary appliance in a canning plant, but this was a particular cooker devoted to this product, to the production of it. On the 23d we stopped three hours for the cooker. On the 24th we were held back on account of the [120—87] cooker, just stopped a few minutes and started again. On the 26th we were held back two hours by the crew that ran the steamer. On the 30th we stopped two hours for the cooker and seamer. On the 31st we ran slow on account of green fruit. We kept running, but ran slow, sorting tomatoes, and it took time. We could not run up to capacity. They did not have the proper fruit. On November 1, 1 hour and 40 minutes stopped for the pulper. The pulper is a machine used right along, the regular standard machine. This was built a little larger than ordinary. Works on the same principle, which was for the purpose of making Salsa De Pomidoro and was specially built larger then the ordinary pulper. From the 3d to the 5th we did not run any. That was during the time of the rain. On the 13th we were held back on account of the tomatoes being green. The 14th we ran along slow on account of the seamer again. On the 15th we ran slow on account of the seamer. On the 16th we stopped 5 hours and 30 minutes for the cooler.

(Testimony of H. T. Rigg.)

That is all the stops we had until the 28th, when we stopped for the season.

The only part of this machinery that was not standard and that everybody knew about was this vacuum pan business. The pan itself was 36 inches in diameter inside measurements, and they stand about 8 feet inside. There are 204 tubes in each pan, and two pans, making 408 tubes. Sometimes some would choke and some would not. We did not remove the tubes to drill them, but installed a drill inside of the tube and went through the pulp or whatever it was. The commodity inside was hard up and down through the tube. My business did not call for me to pay any special or particular attention to frosts or rains. I do not know anything about the trouble they had with the vacuum plant prior to my arrival there, nor how much time, if any, they put [121—88] in drilling out the tubes or the like. I had never had any experience with tomato machinery, that is, the vacuum system on canning fruits. So far as its application to fruit was concerned, that was the first time I had ever known it to be applied in that way. So far as I know, it was an absolutely new machine, this vacuum or tube system. I had been working a little over a year in packing plants.

During the time that we were running this vacuum plant the rest of the plant that ran during the day and some overtime in the evening, though they never ran all night on the other part, but the vacuum plant we ran that night and day about the

(Testimony of H. T. Rigg.)

first week I was there; after that we did not. I do not know how long it had been running night and day before my arrival. In canning ripe fruit like tomatoes you frequently have to run a plant overtime in order to save the fruit from spoiling. We would run through, sometimes run up until the middle of the night, and sometimes simply a couple of hours. They sent out into the fields for the fruit. There were some few of the growers delivering them; I don't know how many. The growers delivered the fruit, from what I understood; I don't know positively; that is, the growers pick their own crop and delivered it at the cannery. Once in a while there would be a little green fruit. We would have to stop sometimes, because we did not have ripe fruit to proceed with. That happens in all canneries.

Mr. Greco himself was at the cannery nearly all the time. I don't know of anything that he could have done to keep this new vacuum plant going at full speed all the time that I was there. I did everything I could to make it run. I don't know what his reason was for running all night unless it was to get out his orders. As I said, when I was talking to him I said he would [122—89] not get out the orders that he wanted, and he said if you get out 20 per cent it would save him all right. That was along the latter part of the season, along about November some time. I could not say whether it was the latter part. There was nothing that I could do to make the vacuum plant work faster, because

(Testimony of H. T. Rigg.)

I was not down on the other machinery. I had nothing to do with that part of it. When I had to drill out with the electric drill, sometimes it choked up in the same tubes and sometimes others. I had nothing to do with the cooker or seamer, or anything but the vacuum plant. Mr. Krenz stated that he wanted a record kept of its operations. He said he wanted to see whether the plant would turn out what he figured it would amount to. He did not say what he figured. He said he had estimated that if run under good conditions and working perfectly it would turn out 50,000 cans a day, that is, six ounce cans. There are 200 of these six ounce cans in a case, and that is what he figured ought to be its capacity. He was there several times and assisted in cleaning out the tubes. He was there the early part of my employment. He told me that it was new and experimental machine and he wanted me to keep data to see what information he could get as to its operation. I do not know the name of the other man, but he was working on the night shift. During the time that he was there, he was only there about a week or ten days after I commenced, and Mr. Greco took him off and I ran during the daytime. Nobody was running it at night.

Testimony of H. T. Rigg, for Plaintiff (Recalled in Rebuttal).

Thereupon H. T. RIGG was recalled by the plaintiff and testified further as follows:

Very frequently during the season of 1916, when I was in the [123—90] employ of the Greco Can-

(Testimony of H. T. Rigg.)

ning Company I had an opportunity of observing the tomatoes that I was putting through this paste machine. There was no time that I can recall when there was a shortage of tomatoes, outside the latter part of the season, in November, those three days that I testified to, and the latter part of the season. We were slowed up at least on two days on account of green tomatoes coming in, and that was due to the fact that it took a long time to sort them, because there were so many green ones. With the exception of that we had plenty of tomatoes. That was not until after the rains. The best day's pack that I had with this machinery was 29,070 cans. I do not think that represented the capacity of the machinery. That was the best we got. That would be around 140 cases. The part of the cannery working on standard and solid pack and so on were running right along. They aimed to run the regular time, about 10 hours. Quite frequently they ran overtime a couple of hours in the evening. They worked right along.

Cross-examination.

In the other part of the plant they could use a different quality of tomatoes. They could use tomatoes a little greener than they could in the vacuum, and for the making of Salsa De Pomidoro it should be a perfectly ripe tomato. They are sorted stock, sorted tomatoes. Those that were of the commoner or inferior quality would be sent over to the other side and put into the general

(Testimony of H. T. Rigg.)

product. During November we did not shut down because we did not have the tomatoes. We shut down the night shift because the night man could not seem to make a success of running it. 29,070 cans was not up to the machine's capacity. The next year we ran the same kind of a pan and I turned an average of 37,000 [124—91] cans a day, with the same kind of machine. Krenz said that if the machine run perfectly and everything connected with it ran perfectly that he could run out 50,000 cans a day. 37,000 cans was my average run, but I never did that in 1916. I don't know as Krenz guaranteed that. Krenz had told him that if it were run properly it ought to produce 50,000 cans. I ran the machine to the best of my ability according to the practice that I had had with the other machinery. I learned about the handling of the machinery in 1917, but the second year I did not work with the same machine. It was the same kind of a machine built under the same patterns. There were no changes in it. The tubes were no larger than the one I was running. They were inch tubes. It was not built in another factory, but by the same manufacturer, of the same size, but I never did get up to 50,000 cans a day. I do not know anything about the condition of the tomatoes out in the fields which were under contract by the growers to Mr. Greco. I was never out in the field. The latter part of November the tomatoes were destroyed by the frost. That is what stopped us

(Testimony of H. T. Rigg.)

running. That is what usually stops the run. We run right up to the frost. I should judge 1916 was an average season in November.

Testimony of Leal Davis, for Defendant.

Thereupon LEAL DAVIS, being called as a witness, testified:

I am superintendent of the Crow Canning Company. Prior to joining that firm I was an engineer, more particularly with refrigerators, although a general mechanical engineer. In 1916 I was consulting engineer of the Greco Canning Company, also chief engineer of the National Ice Company's San Jose plant. In that [125—92] capacity I had something to do with this plant which was installed for the purpose of making Salsa De Pomidoro. My first connection with Mr. Greco was early in the spring of 1916. With respect to the installation of this particular plant, of course, during the early part, we prepared the buildings and the general plan of this plant. That work was being done I imagine along in January and February, and then the machine did not actually arrive there until some time in June or the fore part of July. The manufacturer of the machine directed the installation. He had his own men there. I became familiar with the machinery during its installation, and had an opportunity to observe its operation. Indeed, there were very many delays or trouble in its operation in producing this commodity. Stating what came under my observation: In starting the apparatus up,

(Testimony of Leal Davis.)

I believe after about the second day it was run, we had trouble with the tubes, with the stuff burning in the tubes; it was evident from the start that the tubes were too small to take care of such a heavy product, and it would burn and cook in the tubes which necessitated long shut-down for cleaning; sometimes it cooked as hard almost as like iron, and had to be drilled out, the same as you would drill iron, only it was more difficult to drill because it would stick and cling and clog on the drill bit, which made it a very slow operation; that trouble existed for a time until the following year when those pans were returned to Mr. Krenz and larger tubes were installed in the pans. Since then we have had much less trouble. To my knowledge no machine or equipment of that kind had ever been put to the purpose of manufacturing this product before. This was an experimental work really, both on our part and on the part of Mr. Krenz. The interruptions during the course of the season's work were almost of daily occurrence. I [126—93] doubt if there was a full day's operation during the season that we ran full time without trouble. The time required to accomplish the operation of drilling out the tubes when choked varied depending upon the extent that they were burned. In some instances there would be only two or three tubes *clog* and sometimes practically every tube was clogged. There was one time that I remember we were down about five days and nights cleaning and practically every tube in the pans was clogged. There were 200 and

(Testimony of Leal Davis.)

odd tubes. I do not remember the exact number, in each pan, and there were two pans. There was one occasion when all of them were clogged at the same time. It took five days and nights working continuously, working all night. During that entire five days and nights we did not use the machines for any purpose—could not use the machines for any purpose other than cleaning out.

This is the first installation of that kind of machinery in this country, I believe. I have had experience with machinery since, and I am in the employ of the defendant. The present machinery used is an improvement in the respect that the tubes are larger, but otherwise the general plan is the same. I have had four years' experience with the machinery including 1916, and that has been under my supervision, and I have learned the manner of handling and operating it. With my four years' experience with this machinery I testify that there was nothing that could have been done, not at that immediate time, to have made the machine operate more efficiently than it did in 1916. The remedy which was finally proven and has been done was to have larger tubes installed in those pans, and that is a very long job, which had we undertaken to have done it, before the work could have been completed, the tomatoes would have been all gone. Of course, it [127—94] was not until it was pretty well along in the season that we were firmly convinced that larger tubes was the remedy.

As to capacity: With the smaller tubes, of course,

(Testimony of Leal Davis.)

you have got a greater heater surface, and if the tubes would keep clear you would have a larger capacity with smaller tubes than you would with larger tubes on account of having more heating surface there; but, as a matter of fact, the small tubes did not keep clear, which made continuous running impossible. So I would say the overall capacity was increased, whereas the capacity for a short period while the tubes were cleaned would be decreased. Since the machine was changed the largest day's run we have made was 128,000 cans with four pans; that would figure out about 30,000 with one pan. It is far below what the guaranteed capacity was supposed to have been originally. On account of my experience with this type of machinery I am now consulted widely with respect to the operation of this kind of machinery. I believe I am more or less regarded as an authority now with regard to this type of machinery, and I am stating what I have stated with respect to its output in 1916 in view of my experience. I know that the cannery shut down early in the fall of 1916, that is, earlier than it has since I have been connected with it, on account of early frost. I do not remember the exact date. The subject of frost is, of course, something with which I have nothing to do.

Cross-examination.

I am familiar with the reasons why this machinery failed to work. There were some difficulties with the pulper and seamer, and there always has been ever since. As a matter of fact, I believe that

(Testimony of Leal Davis.)

it is quite customary in most canneries that these machines always give more or less trouble. They are the kind [128—95] of machines that are used in practically every cannery, that is, the cooker, pulper and seamer. Practically the only thing new about this paste line installed in 1916 was the vacuum pan part of it. Of course, the other machines were built ordinarily to handle these small cans. These small cans are more difficult to handle than the ordinary sized cans, that is, the 6 ounce cans in which the Salsa De Pomidoro was packed. It is no harder to cook a six ounce tin, but it is harder to get in and out of the cooker on account of the fact that the can does not roll as readily as the larger diameter can. The pulping machine was practically, I believe, an ordinary pulping machine. The delay on account of the pulper, cooker and seamer generally, but not always meant delay in the whole apparatus. Sometimes the delay in the pulper might not shut down the vacuum pans, because you might have enough pulped ahead to have a surplus to run on for a while, which is generally done.

I did not so much supervise the running of this machine as the installation of it, but I supervised the running of the vacuum pan. I was there every day. The man who built the machine directly supervised or installed it, but I had supervision over the whole plant in a general way. I know Mr. Rigg who testified. He was actually running the thing for a while; I don't know how long. He came

(Testimony of Leal Davis.)

there when the season was fairly well advanced; in fact, we got through with most of our serious troubles before he came. I could not recall the exact time he came. I believed he stayed to the end of the season. He ran the vacuum and was on the job every day. I think they started the plant some time early in September. He came there the 2d or 3d of October. We had our greatest trouble on the start in this way: We wanted to make a very heavy product and the product that we made at first—Mr. [129—96] Greco was very anxious to have it still thicker. In making it still thicker we had more trouble with burning. Then after a time everybody decided that it would be better to make a little thinner product and sacrifice quality a little bit and have more capacity, so that we would not be shut down for so much cleaning. I was there every day and saw this part of the plant in operation. I do not think I ever say the paste line shut down for lack of tomatoes.

Thereupon the following proceedings took place:

Counsel for plaintiff offered in evidence a tabulation showing acres, tons and tons per acre of tomatoes from 1916 to 1918, inclusive, stating that the tabulation had been prepared from the books of the California Packing Corporation and the California Fruit Canners' Association, and that it showed the tonnages not only of Santa Clara County, but Alameda County, Los Angeles County and Santa Rosa, meaning Sonoma County.

Mr. McNAB.—I desire to offer an objection at

(Testimony of Leal Davis.)

this time, not to the competency of the proof, because I do not want Mr. Lannigan to be put to the necessity of bringing in witnesses here to authenticate it, but I object to the relevancy and materiality of all these computations and particular to all evidence as to the years 1913, 1914, 1915, 1917 and 1918, as entirely irrelevant and immaterial in this case, and I object to that for the year 1916 as being irrelevant and immaterial in view of the fact that this incorporates the tonnage from distant and remote parts of the State of California, and are not relevant nor material.

The COURT.—I think that it is relevant because of the evidence that has been produced of the witnesses of the defendant tending to show the character of production for that year and for [130—97] other years, and by a comparison of some of the witnesses of the production of that year with that of other years. Let it go in.

Mr. McNAB.—We save an exception.

Which exception the defendant hereby specifies as

DEFENDANT'S EXCEPTION No. 3.

Plaintiff's Exhibit No. 3 is as follows:

Plaintiff's Exhibit No. 3.

Acres and actual deliveries in tons—Season 1913.

	Acres.	Tons.	Tons to Acre.	Average Delvs. During Past 5 Yrs.
C Alameda Co.	1138	6766	5.94	8.05
F San Jose	1383	8268	5.97	
C Los Angeles	946	2416	2.55	3.83
A Santa Rosa	508	1890	3.72	5.60
	3975	19340		S. Clara 8.66
				Sacto. 6.00
				Stockton 2.50

Acres and actual deliveries in tons—Season 1914.

C Alameda Co.	1550	16528	10½
F San Jose	860	4954	8½ on 495 acres.
C Los Angeles	863	4131	4–¾
A Santa Rosa	373	2333	6¼
	3646	27946	7.7 tons to acre.

Acres and actual deliveries in tons—Season 1915.

C Alameda Co.	1562	16183	10–⅓
F San Jose	506	5437	10–¾
C Los Angeles	670	1749	2½
A Santa Rosa	274	1526	5½
	3012	24895	8 tons to acre.

Acres and actual deliveries in tons—Season 1916.

C Alameda Co.	2186	16377	7.49
F San Jose	2127	19347	9.09
C Los Angeles	1125	5325	4.75
A Santa Rosa	272	1537	5.65
Sacramento	278	2485	8.94
	5988	45071	7.5 tons to acre. [131—98]

Acres and actual deliveries in tons—Season 1917.

Alameda Co.	1737	13428	7.73
San Jose	3544	29314	8.27
C Los Angeles	1549	5056	3.26
P Santa Rosa	728	5032	6.91
C Sacramento	960	4817	5.00
Stockton	606	1005	1.65
Marysville	188	10	——
	9312	58662	6.3 tons to acre.

(Testimony of Leal Davis.)

		Acres.	Tons.	Tons to Acre.	Average Delvs. During Past 5 Yrs.
Acres and actual deliveries in tons—Season 1918.					
	Alameda Co.	1175	6894	5.87	
C	San Jose	1397	13284	9.51	
P	Los Angeles	970	4774	4.91	
C	Santa Rosa	1412	7801	5.52	
	Sacramento	1217	4256	3.50	
	Stockton	1445	3833	2.69	
		7616	40842	5.36 tons per acre.	

At this point Mr. McNab on behalf of the defendant read in evidence from the deposition of the plaintiff P. Pastene taken in the case certain questions relating to samples of the defendant Greco Canning Company's product and the fact that no contract had been signed by the plaintiff for the sale thereof, as follows: "Q. Now, as a result of your letter to North & Dalzell, Inc., of November 18, 1916, there followed two letters to you of November 24, 1916, and December 15, 1916, Plaintiff's Exhibits 1 and 2, respectively, which have already been shown to you? A. Yes."

WITNESS.—(Continuing.) Those two letters form a part and parcel of the contract that was entered into with the Royal Packing Company. There were contracts drawn between the Royal Packing Company and my firm. I examined the triplicate contracts that you now hand me and state that those were the contracts which were submitted to me. Those contracts were never signed. The reason they were not signed was the arrangement was that they were not to be signed until we had been shown further samples sent direct from the factory. These

(Testimony of Leal Davis.)

further samples were sent to me direct from the [132—98A] factory. They were examined but they were not accepted because the quality did not correspond with the quality which had been shown us by the brokers, North & Dalzell, Inc.

"Q. Now, was the price made you by the Royal Packing Company, of Windfall, Indiana, in the November 23d contract, a fair market [133—98B] price for the goods at that time? A. For goods of the quality which they offered to furnish, it was the cheapest price that we were able to get from any source. The reason the contract did not finally go through to confirmation was that, while the quality of the tomato itself was satisfactory, and would have been acceptable, there was carelessness in the processing of the tomatoes, so that they contained slight evidences of grit or sand, showing that in the washing of the tomatoes proper care had not been used, and, as that was an objection which our trade would not countenance, or a fault that our trade would not countenance, we were obliged to refuse to confirm the contract after the receipt of several lots of samples, and after in fact carload had actually been shipped, and reached New York, and was passed upon by North & Dalzell, Inc., the representatives of the packers and ourselves."

Mr. McNAB.—Now reading from page 12, this being introduced for the purpose of showing that the plaintiff was fully advised of the fact that machinery had to be installed, and so on. (Deposition continuing.)

(Testimony of Leal Davis.)

"Q. So that the goods which they were offering you at $18.00 per case were of an inferior quality to those which you had purchased from the Greco Canning Company? A. For our standard.

Q. For your trade? A. Yes.

Q. I believe, Mr. Pastene, you have already so stated, but, to make sure, I would like to have you state again, what caused the scarcity of this line of goods in the American market?

A. It was an article, which, prior to the war, to my knowledge had never been manufactured in this country. As a result of the abnormal conditions the exportation from Italy was curtailed, embargoes were placed from time to time, until ultimately the [134—99] exportation was entirely prohibited. As a result of this, domestic canners of tomatoes principally interested themselves in imitating the article, or manufacturing it here from the American tomato. However, this necessitated of course, the installation of new machinery, new arrangements, so that it was not possible to produce in quantities to take care of the entire demand and consumption of the people who were accustomed to using this product."

Testimony of William E. Greer, for Defendant.

WILLIAM E. GREER was thereupon called as a witness for defendant and testified:

I have resided in the Santa Clara Valley for six years. I was there in 1916. I am a farmer, and I was at that time raising tomatoes. I own twenty

(Testimony of William E. Greer.)

acres in that valley. In 1916 I cultivated 4½ acres on Mr. Kell's place and 1½ acres on my own land, —a total of about 6 acres. I was under contract to deliver those to the Greco Canning Company. I delivered a little less than 21 tons. That made about 3½ tons per acre. That was not my entire crop by any means. My entire crop in tonnage was around 25 tons to the acre; that is what I would have had in what was spoiled and what I delivered. I had about 25 tons to the acre but delivered only about 3½ or 4 tons to the acre. The reason for my not delivering the difference was that they spoiled; the rain came and then the frost. About May 1st we began to plant. We plant them and then along in the middle of May we had a frost. That meant that we planted most of our tomatoes over. We finally planted at that time, about the 20th of May, if I remember correctly. That gave 20 days less growing. Then we picked. We got off the first picking and started in the second picking when the frost [135—100] and rain caught us. Through the month of October we had rain. That hurt our tomatoes and they did not ripen. When they did begin to ripen frost caught them. That is the reason we did not get them off. In October I don't remember exactly how many consecutive days it rained, but if I remember right it rained about half an inch during that month. I visited the Weather Bureau in Santa Clara within the last day or two, and made an examination of their records relative to confirming my impressions. I am fa-

(Testimony of William E. Greer.)

miliar with crop conditions in the surrounding territory around my place. I visited other tomato patches, lots of them, because I wanted to see if the same conditions prevailed. I found the conditions were entirely the same as my own. They had been absolutely killed in the middle of November.

Mr. McNAB.—Q. About what percentage of the crop, if you can estimate it, was left rotting on the ground at the end of the season?

A. At least 80 per cent left on the ground.

Q. Would you, under normal weather conditions, have been able to deliver that 80 per cent to the cannery?

A. Most certainly; it would have given us 15 days more.

Q. In a memorandum which was handed me here, I think by yourself, I find reference to the weather report that on October 3, 4 and 5 it rained in the Santa Clara Valley. Do you recall anything concerning that?

A. I know it rained; I could not remember exactly the date, but I know we had rain in that month.

Q. What is the effect of a three day rain on a tomato crop?

A. At that time in the season is not much except—

The COURT.—I suppose it depends also on the character of the precipitation.

A. Yes, and the soil.

Q. And the extent of the precipitation; a rain

(Testimony of William E. Greer.)

might be a drizzle, [136—101] or it might a deluge.

A. This was a heavy rain at that time.

Mr. McNAB.—Q. The record shows 84/100 of an inch.

A. It was something out of the ordinary.

WITNESS.—(Continuing.) As to its effect on the tomato crops, it started our vines growing. It held the fruit back. It would not ripen as early. You could not get on the ground to get off the crop for at least a week. Had normal weather conditions prevailed we would have been able to deliver the 21-odd tons per acre from our patch to the cannery. I did not find any place in the Santa Clara Valley where these conditions did not exist. The crop that year was not particularly a heavy one. It was no more than an ordinary crop. Twenty-five tons to the acre is a normal crop in my vicinity. They have raised more this year and last year. The best picking season for the tomato crop in the Santa Clara Valley is in October and November, the last of October and the first of November, and during the last of October and the first of November it rained, and the situation was the same with respect to the crops around me.

Cross-examination.

In my vicinity the average production of tomatoes in the Santa Clara Valley in the year 1916 would be an average of about three or four tons per acre; that is on the south side of San Jose, that is in the heavy land, in the best tomato land. I mean by that

(Testimony of William E. Greer.)

what was delivered; that average would be about 3½ or 4 tons. I have no way of calculating exactly. You can calculate on what the other fellow hauls in. I was familiar with what the other fellows were hauling in. I was with them every day. I mean by this deliverable stuff, good tomatoes. I am still a farmer on the same place. I know how many tomatoes some of my friends [137—102] delivered to the California Packing Corporation. I can tell how many Mr. Withers delivered. He delivered about 7 tons to the acre. I do not know what was the average production in tomatoes in 1915. I was not in the game then. I was with one of my neighbors in 1915, and I am not familiar with the average production. I do not know what was the average production in 1917. I had nothing to do with the tomato game then. I was putting in a new orchard and did not bother my head about tomatoes, because I was discouraged from the year before and I said goodby to tomatoes. I do not know in 1918. I have not had any interest in tomatoes ever since and I do not want to have. My experience is confined to the raising of tomatoes in 1916 and on Mr. Mosher's place. When you go in with a certain number of men hauling to a certain place, you know how many boxes a man brings in. You can tell how much he is bringing in along with your own. I mean the year I hauled to this particular cannery. I do not know anything about the other canneries because I had no way of knowing. We go an entirely different route. We simply get

(Testimony of William E. Greer.)

talking to a man hauling to a particular cannery and we discuss the matter. We say, how many boxes is he bringing in. 200 boxes. I know just how many that means. That means six tons. I did not sell any to anybody else.

Testimony of J. L. Mosher, for Defendant.

J. L. MOSHER, being duly sworn as a witness for the defendant, testified:

I resided in the Santa Clara Valley in 1916. I am an orchardist and farmer, owning my own property. In 1916 part of my business was raising tomatoes. I had from 20 to 23 acres. I got nearly 100 tons. I delivered about 50 tons to the cannery, a little in excess of two tons to the acre. I delivered all that [138—103] I could pick. I did not deliver all that I raised. The balance of the crop was destroyed. The rain came and the frost. Some of the tomatoes when it rained were under the vines and some lay on the ground, and if the tomato touches the ground it rots and gets soft, and they are not acceptable and they have to be thrown away. I could not tell you how many tons per acre were not taken out of the tomato patch, but it was an enormous loss. I do not believe I could tell how many. I know it was very large. I lost more than I delivered to the cannery. I delivered to the California Canners Association, Mr. Bentley's company, which became the California Packers. I ought to have had a great deal more. I cannot tell you exactly how much more; it would be guess work;

(Testimony of J. L. Mosher.)

it was a large amount, of course. Under normal conditions a normal crop varies from year to year. I do not know that I could tell you. It ought to have been from 12 to 15 tons anyhow.

The witness here produced a memorandum showing the amount of his deliveries, and the same was received in evidence and marked Defendant's Exhibit "PP." It is as follows:

Defendant's Exhibit "PP."

"CAL. CANNERS ASSOCIATION—1916.

				Net.	
Sept.	1	35	Tons	1410	
	4	46	28 boxes catsup	1902	
	12	66		2687	
	12	103		3766	
		106		4293	
	16	49		1803	
	22	73		3141	
	27	111		4546	
	29	82		3494	27,032
Oct.	6	101		4252	
	4	95		4050	
	7	113	21.965	4821	
	11	101		4065	21965
	11	111		4777	48997
	12	104		4212	
	17	116		4688	14073

(Testimony of J. L. Mosher.)

	18	127	5173	63070
	19	117	4740	
	21	115	4547	9287
[139—104]				
Oct.	24	118	4726	72357
	25	125	4965	
	30	137	5244	14935
	14	122	4911	87292
Nov.	13	111	3922	8833
				96125

WITNESS.—(Continuing.) I did not have much opportunity to see the tomato patches of adjoining growers. I know that most of them were disappointed. I have not been in the tomato business since. That settled it. I had raised them on and off for a good many years.

Cross-examination.

I cannot tell the dates that it rained in 1916. I do not remember the months nor when the frost came. I know the frost came early. I know I stopped entirely that year. I think I stopped around the 13th or 14th. That was the last delivery. That was picked the day before it was delivered; the 15th of November that should be. I think we were a little short of help, a little short but not so as to be crippled at all. My tomato crop I think was not under contract. I think I delivered it without contract. I never contracted with them. I knew they would

(Testimony of J. L. Mosher.)

always give me the market price and I have always been satisfied. I sold just one load to Mr. Greco. I would have sent more if it had not rained. I was going to deliver the balance of my crop to him if it had not rained. I was not under contract to him.

Testimony of Oscar Hoffman, for Defendant.

OSCAR HOFFMAN, being called as a witness for the defendant, testified as follows:

I am a merchandise broker specializing in canned goods; [140—105] familiar with the tomato trade in 1916. I know Mr. Greco. Specializing in canned goods 22 years, and during that time believe I have had occasion to familiarize myself with the customs of the canning trade. The terms "short pack" and "prorated delivery," have a generally defined and accepted understanding in the trade. With regard to the term short pack, what is understood and accepted by the canning and packing trade as a reason for a short pack, what it means according to the common acceptation of the word, is damage to crop, frost, or any other well authenticated reason for which a packer is unable to fulfill his contract.

Mr. McNAB.—Q. Has the element of good faith on the packer anything to do with the definition of that term; by "good faith" I mean ethics on the part of the packer or the canner to deliver as much as he can?

A. That is a matter entirely between buyer and seller, the good faith of the contracting parties.

(Testimony of Oscar Hoffman.)

WITNESS.—(Continuing.) I know where the plant of the Greco Canning Company is. I have knowledge with respect to the crop of Salsa De Pomidoro, prepared by the Greco Canning Company in 1916. My knowledge arose as a broker. I sold a portion of the pack. I had sold 3,000 cases. There was a very short delivery. I have not looked up my records but believe somewhere between 15 and 20 per cent. I am speaking of the sales made in 1916 from this particular pack. It was packed by the Greco Canning Company and they sold some of it to me.

Mr. McNAB.—They sold to this witness exactly the same amount that they sold to Pastene & Company.

The COURT.—Q. Did you have a contract with them? A. Yes, sir.

Mr. McNAB.—Q. What contract was that? [141—106]

A. That was the J. M. McNiece & Company

Q. You contracted for 3,000 cases?

A. Yes, sir.

Q. And there were delivered 16.7 per cent?

A. Yes, sir.

WITNESS.—(Continuing.) I visited the canning plant of the Greco Canning Company while they were engaged in the manufacture of this product. I saw the conditions confronting the defendant. To the best of my recollection I called there at one time, and I was very much interested in watching the process. I found that they had stopped work

(Testimony of Oscar Hoffman.)

because the pipes leading up to the vaccum tank were clogged and it was impossible to continue. This mass of tomatoes had apparently solidified in these pipes or caked until they had to use drills to clear out each pipe. Later on when they had managed to get back into working order again, I found that they had to work very much slower because of the lower degree of either heat or vacuum. I do not know the identical process, but on account of the discharge of these pipes becoming again clogged, they had to work very, very much slower. I do not know about the Salsa De Pomidoro ever having been manufactured in commercial quantities in the United States prior to 1916. I believe it was the first experiment in California. I visited the Greco plant at irregular intervals. They were busy at all times, either producing or endeavoring to correct faults in the machinery. I have been around canning plants frequently in the last 20 years and am fairly familiar with their operations. There was nothing being left undone that I could see in an effort to produce. I only know it was a very short delivery. My records would show but I have not looked it up. I was the broker in the transaction. The goods were not delivered to me. They were sent to New York. I know that it was accepted.

Mr. McNAB.—Q. In the term short pack as understood by the [142—107] canning trade, will a break down or a failure of the machinery to operate be accepted as a reason for a short pack?

(Testimony of Oscar Hoffman.)

A. I think so.

Q. Will you just explain the full significance as understood by the trade of the term short pack; just give some illustration of what it is intended to include; does it mean merely a shortage of crop or does it mean other things?

A. It includes a shortage of crop, a break down of machinery, or primarily causes over which the packer has no control, labor strikes and other conditions of similar nature, and fire.

Cross-examination.

The COURT.—Q. Are you speaking now only of your method of dealing, or of the acceptance by the trade generally throughout the country? That is what we are governed by?

A. I am speaking of the trade generally throughout the country.

Q. You want us to understand that the trade generally will accept the breaking down of machinery, without reference to the question of whether it is through the fault of the packer, or not, as a ground for a short crop?

A. I think they would; not a short crop, your Honor, but a short pack.

Q. I mean a short pack? A. Yes, sir.

WITNESS.—(Continuing.) I got this experience as to what the term short pack meant in this way: In our business we come in contact with it every season. We get short deliveries on some commodities; many hundreds of thousands of cases we sell

(Testimony of Oscar Hoffman.)

of canned goods, and there is not a year where we get a full delivery on a complete line. We are vitally interested in brokers in earning our commissions on a full line. When there is no delivery we get no commission, consequently we follow a man's order closely. [143—108] We do not get delivery ourselves. At times we are requested to accept on behalf of buyers. We did not do so in 1916 that I recall. I cannot recall whether I was authorized at that time to make any acceptance of either quality or quantity on behalf of the McNiece Company. I cannot recall any specific case of anybody with whom I have dealt making a short delivery on account of break down of machinery. I would like to qualify that by stating that there are many times when a packer's machinery will break down temporarily. I do not recall any specific case nor a single instance. I did not discuss with the members of the tomato trade the question of break down of machinery in its bearing on the question of short pack. I have heard break down of machinery discussed in a general way. I took no note of it.

Mr. LANNIGAN.—I understood you to say that short pack meant a short pack on account of crop being damaged by frost or rain, or any other well authenticated reason why the packer could not deliver; I will ask you to state what you mean by well authenticated reason.

A. By well authenticated reason I have in mind any reason by which a parker is prevented in good

(Testimony of Oscar Hoffman.)

faith from carrying out the full terms of his contract.

Q. Any reason at all?

A. Any reason at all in line with my previous statement.

WITNESS.—(Continuing.) I can only speak from the custom. I am only broker, I trade with hundreds and hundreds of people in the course of my career.

The COURT.—Q. I will put it this way: Do you know what the trade recognizes as the ground for a short pack—if you are only a broker?

A. They recognize—

Q. Do you know? You say you are only a broker; now do you know, and how do you know?

A. I know from the fact that they [144—109] accept short deliveries; they merely accept them; some they inquire and sometimes they do not; they keep fairly well posted on trade conditions themselves, in fact, they keep very well posted.

Mr. LANNIGAN.—Q. Is it not a fact that you never did have anybody accept a delivery and accept as a short pack, a delivery of tomatoes where there was a break down in machinery?

The COURT.—You mean on the ground of a break down in machinery?

Mr. LANNIGAN.—Yes, sir. Is it not a fact that you never have had that experience?

A. I cannot answer that and I would like to explain why if I might.

(Testimony of Oscar Hoffman.)

Q. Do you believe then that in the case of machinery a packer is entitled to experiment at the other man's expense?

A. I believe that a packer in selling his merchandise does the best that he can under the conditions under which he is operating. I have seen machinery break down, I have seen boilers go out of business, perhaps only for a day, where the percentage of delivery is not materially affected. I believe buyers know whether or not it is an experiment to a certain extent. That is my answer to your question.

WITNESS.—(Continuing.) I made trips to the plant of the Greco Company off and on during the season of 1916 and found them always busy. They were busy canning, casing, shipping, receiving. With particular reference to this Salsa De Pomidoro, I have found where they were working and where they were not working on account of the machinery breaking down and trying to rectify it, and I found them making salsa at the time. They were also canning tomatoes. I believe I bought some of their general pack that year besides the salsa. I do not know how many hours a day they were working. I usually went there Saturday afternoon. [145—110]

Redirect Examination.

Without defining all I can give some illustration of things that have been recognized by the trade for short packs; a shortage of cans, for instance. No matter what the packer has agreed to deliver, if he

(Testimony of Oscar Hoffman.)

has not had delivered to him by the manufacturer a sufficient number of cans, that is accepted as a reason for a short pack.

Thereupon the following took place:

The COURT.—Q. You would not know what would constitute a well ordered factory, would you?

A. In a general way I would, but not as regards this particular product.

Mr. McNAB.—Q. And is not the reason for that because this was the first year this was manufactured? A. Yes, sir.

WITNESS.—(Continuing.) For about twenty years I have been going into canneries where I have been buying goods and am familiar with the operations of an ordinary cannery and I can generally tell whether they seem to be working full time and making a standard production. Speaking of Mr. Greco's cannery, to the best of my recollection it appeared to be working. I do not want to get confused here. I paid many visits to the Greco cannery but this was three years ago.

Recross-examination.

To the best of my recollection there were times when the cannery was running to capacity and there were times when it was not. Most of the time the salsa was not running to what I considered capacity. I took particular pains to inquire why the production was not greater, and sometimes the salsa line stopped altogether for repairs to the machinery—in the middle of the pack, [146—111] I believe. There were times when the cannery was very busy

(Testimony of Oscar Hoffman.)

and times when it was not so busy. My recollection is that the salsa machinery was out of order for quite a long time—several weeks, that it stopped for several weeks at one time. That is my recollection; say two weeks, or something like that; and the other industry carried on in the factory went on just the same; one is independent of the other. During the time that it was suspended on the salsa side, they were working on the machinery.

Testimony of R. W. Crary, for Defendant

R. W. CRARY, being called as a witness for defendant, testified as follows:

I am a canner and canned goods broker. Have been engaged in the cannery business since 1901. Deal in peas, milk, fruits and vegetables. I operate a cannery at San Jose at the present time and have been since 1918. During my experience I have had an opportunity to familiarize myself with general customs and acceptances of the canning trade. The term "short pack" has a definite and accepted meaning in the canning trade in California. The term "short pack" is understood by the general trade to mean briefly failure to get the goods into the cans. A *pro rata* of production in the form of a short pack is a very frequent occurrence in the canneries. Instancing in a general way what the trade understands it to cover, I say failure of crop, failure of ordinary supply of cans, strikes, or, as we express it in our contracts frequently, contingencies over which we have no control.

(Testimony of R. W. Crary.)

The COURT.—Now that sounds reasonable. He means things that are beyond the control of the factory.

Mr. McNAB.—The contract in this case, your Honor, aside from the question of short pack, contains that additional clause.

Q. You say failure to get the goods into the cans? [147—112] A. Yes, sir.

I am familiar in a general way with the product known as Salsa De Pomidoro. I know it was not a domestic product in the United States prior to 1916. I think there was not any machinery devised in this country to my knowledge for the manufacture of that product prior to that time. I have had experience as a canner since 1901, and have had to do with the general customs and acceptances of the canning trade since 1893. In addition to my experience as a canner I have engaged in buying and selling goods only as a broker. During that period of time I have familiarized myself with the operation of canneries and with the custom of the trade and the general acceptances of the trade and the reasons it will be accepted for failure to deliver goods up to the point of contract.

Q. Assuming that a canner engages to deliver a given quantity of goods but through unforeseen difficulties with his machinery notwithstanding his efforts he is unable to produce the quantity which he agrees to deliver, state whether or not the trade recognizes that as a justifiable reason for a short pack and a *pro rata* delivery? A. They do.

(Testimony of R. W. Crary.)

Mr. LANNIGAN.—One moment. I make the same objection to that question, your Honor.

The COURT.—The objection is sustained.

Mr. McNAB.—We save an exception.

Which exception the defendant hereby specifies as

DEFENDANT'S EXCEPTION No. 4.

Mr. McNAB.—Q. Assuming that a manufacturer engaged in the production of a product and installs machinery that had theretofore not been used in the United States for the production of that commodity, and notwithstanding his efforts in the manufacture of [148—113] the product he is unable on account of trouble with the machinery, which he was unable by the use of engineers to control, he failed to produce a sufficient quantity to fulfill the contract, state whether or not that would be accepted by the trade in California as a justifiable reason for a short pack and a *pro rata* delivery?

A. I am satisfied they would accept that as a cause for nondelivery.

Mr. LANNIGAN.—I move to strike out the answer of the witness as not responsive to the question.

The COURT.—The answer is not responsive. You will have to answer the question in a more definite way. You say you believe they would?

A. I know they would as I have had instances of deliveries that I have been compelled to make in that manner.

(Testimony of R. W. Crary.)

Mr. McNAB.—Does the answer stand, your Honor?

The COURT.—This is not the answer that was stricken out. This is a new answer.

Mr. McNAB.—I would like to save an exception to the order striking out the answer. I did not know your Honor ruled definitely on that.

The COURT.—Yes, I said it was not responsive.

Which exception the defendant hereby specifies as

DEFENDANT'S EXCEPTION No. 5.

Mr. McNAB.—Q. What circumstances justifying a short pack would be incorporated under the common acceptation of the trade term, or other circumstances beyond the packer's control.

A. Specifically, failure of the usual sources of supply of cans or fuel; like of an adequate supply in labor; a break down in machinery; a failure of transportation, which might bring in the fruit. [149—114]

The COURT.—Q. You don't mean failure in the usual sources of supply in cans and fuel to mean merely the failure of the packer to take usual and ordinary precautions to supply himself with those things, but the failure of the source of supply so that he could not get them?

A. He would have to satisfy the buyer as to his good faith in attempting to supply himself.

Cross-examination.

I am still in the packing business. I am not a stockholder in the Greco Canning Company and

(Testimony of Charles E. Hume.)

have no interest in it whatever. I have a separate cannery.

Testimony of Charles E. Hume, for Defendant.

CHARLES E. HUME, being called as a witness on behalf of the defendant, testified as follows:

I am a canner and packer. I have two plants located in California and two in Alaska. We pack fish as well as fruit. My company is one of quite large proportions in its output. It produces approximately 250,000 cases in California and about 150,000 cases of salmon in Alaska. I have been engaged in the packing and canning business personally 20 years. The company has been in existence since 1864. It is the firm of G. W. Hume & Company. During that time I have been engaged in the packing of fruits—tomatoes in a small way. I am familiar with the common understanding and acceptance of the trade, and the application by the trade of the use of the term "short pack."

Mr. McNAB.—Q. Just describe to the Court what the term "short pack" is held by the trade generally to include? A. Do you mean causes? [150—115]

The COURT.—Yes, what causes are regarded by the trade as justifying a short pack?

A. There are hundreds of causes that may cause a short pack, but as regarded by the trade the particular thing that causes the short pack is not of so much importance as the effort put forth by the canner to overcome that difficulty. There are cans, fuel, shortage of sugar, explosion of boilers and

(Testimony of Charles E. Hume.)

many other things that will cause a short pack, but it must be shown that the packer, in the event of any of these shortages, has used reasonable effort to overcome them at the earliest possible moment.

Q. Then it must be beyond his control to fill it?

A. Yes, sir.

Testimony of L. E. Sussman, for Defendant.

L. E. SUSSMAN, called as a witness on behalf of the defendant, testified as follows:

I am a merchandise broker, specializing in canned goods. This is my third year in such business. It will be about three years at the end of this year. The bulk of my business has been with canned goods. I have had occasion almost every day in the course of my experience, to deal with the question of short pack. The question of prorate under a short pack is a matter of very frequent discussion in the trade. Almost every canned goods contract for future delivery has that clause embodied within it.

Mr. McNAB.—Q. And with respect to the frequency with which canners are compelled to meet this question, does it not arise on nearly every delivery in the year, more or less?

A. Almost every cannery is compelled to make short delivery on some one item or other almost every year.

WITNESS.—(Continuing.) I am familiar with the general understanding of the term "short pack," and the reasons for it which [151—116] are accepted by the trade in California.

(Testimony of L. E. Sussman.)

Mr. McNAB.—Q. Just describe to the Court in a general way what that is intended to include, as you understand it in the trade?

A. The trade understands that the canner, in selling a certain amount of goods on a future-delivery contract is selling that quantity of goods in good faith, and expects at the time to deliver the full quantity that he sells; it is thoroughly understood by the trade, however, that if he does everything in good faith that he can to make full delivery, if he is prevented by circumstances beyond his control, then the trade in general will absolve him from responsibility of delivery, as long as he has done everything that he can in good faith to deliver in full and has not deliberately over-sold himself.

Q. And within the term "circumstances beyond his control," state what the trade would recognize as being beyond his control?

A. Anything that he could not, in the exercise of reasonable precaution, prevent; for instance, if I might give an instance, if a canner should fail to make delivery because he has not sufficient cans, the trade would not excuse him if he did not order the cans, or if he did not order them within a reasonable time; for instance, as happened during this past season, canners were compelled to make *pro rata* deliveries on certain items because the American Can Company did not deliver certain sizes of cans to them on time. The American Can Company, as a matter of fact, could not itself deliver them on time because of the railroad strike, and that

(Testimony of L. E. Sussman.)

prevented them being put in the cans at a certain time. If the canner had not ordered those cans, I do not believe the trade would have absolved him from the responsibility of delivery; in fact, I know they would not. But, if it was beyond his control to get delivery, that would be different. [152—117]

Testimony of Elmer E. Chase, for Defendant.

ELMER E. CHASE, being called as a witness on behalf of defendant, testified as follows:

I am a fruit canner and at the present time president of the Canners' League. The Canners' League is an organization of canners in Central and Northern California that embraces probably 90 per cent of the canners in this section. I have been engaged in the canning trade for 41 years, all of that time in California. I have been engaged in that time in the actual canning of goods myself or as an employer. The Canners' League has offices in San Francisco, and deals to a certain extent with disputes between producers and purchasers, and the like. To some extent it acts as arbitrator and so on. I am familiar with the common acceptation and application of the term "short pack" in the canning trade.

Mr. McNAB.—Q. Will you just state to the Court what it is understood by the trade to include?

A. To include conditions beyond the control of the canner, where the canner has used reasonable diligence in providing against such conditions.

(Testimony of Elmer E. Chase.)

Q. What will be accepted as beyond a canner's control in applying that term?

A. Shortage of cans, injury from the elements, flood, fire, or even excessive heat, or a crop damage, labor troubles.

Q. Trouble in the factory? A. Yes, strike.

Q. Is there any absolute or arbitrary limit to the causes to which it will be applied, provided the canner has used diligence and good faith?

A. I should say not.

The COURT.—By the term "good faith" you mean as used in connection with the use of reasonable and proper efforts? [153—118]

Mr. McNAB.—Yes, if he has used reasonable and proper methods to produce the commodity and has not been able to produce the amount to be delivered, will the trade accept that as a reason for a short pack and prorate delivery?

A. That has been my experience.

Q. Are you familiar with the product known as Salsa De Pomidoro?

A. Not from any experience with it.

Q. It has not been produced as a domestic commodity in the United States prior to that time?

The COURT.—Mr. McNab, I don't suppose there will be any question about that.

Mr. LANNIGAN.—We have admitted it, your Honor, and have right from the beginning.

Mr. McNAB.—This is the first time that it has been admitted.

The COURT.—The whole course of the trial

(Testimony of Elmer E. Chase.)

shows that there has been no question about that.

Mr. McNAB.—Q. Assuming that a canner has agreed to deliver a certain commodity which theretofore had not been produced commercially in the United States, and assuming he installs the machinery to the best of his knowledge, and in good faith, that is applicable for the purpose, and that he operates it to the best of his ability, with engineers, but it fails, on account of structural or mechanical defects, to produce the amount of the goods which he has contracted to deliver, will the custom of the trade accept that as a justifiable reason for the delivery of a prorate or short pack?

A. I should say that the trade would.

Testimony of Victor V. Greco, for Defendant (Recalled).

VICTOR V. GRECO, being recalled by the defendant, testified as follows:

I have made a search to ascertain whether or not we can find [154—119] the contracts that we had for the delivery of tomatoes from the acreage of 1916, but we have not been able to find any. There was no reason why we should have kept those contracts after 1916. I believe they must have been destroyed when we moved from our old office to the new office. Since I was on the witness-stand I have made investigation and computation to ascertain as closely as I could the acreage which we had under contract for delivery to us in Santa Clara in 1916. The acreage was between 500 and

(Testimony of Victor V. Greco.)

550 acres. The number of tons of tomatoes delivered to our cannery during the season of 1916 was a little over 2,000. I can estimate the amount of tonnage which there was in the acreage which we had contracted for delivery to us. We should have had not less than 5,500 tons delivered from that acreage, and there were delivered to us from that acreage a little over 2,000. The failure of the delivery of the remaining 3,000 odd tons was not due to any action on our part.

Mr. McNAB.—Q. Possibly you have answered this before, but I want to be absolutely sure about it, and I will ask you the question again: What engineers did you have in superintending the operation of this plant for the production of the Salsa De Pomidoro?

The COURT.—That all has been gone over. He said the man who constructed it came down there and installed it.

A. Also Mr. Davis.

The COURT.—That is, Mr. Davis testified that he supervised it.

Mr. McNAB.—Q. Mr. Davis has become an authority on that subject, has he not? A. Yes, sir.

WITNESS.—(Continuing.) There was absolutely not anything at all spared in effort in order to produce the full quantity that was [155—120] expected to be produced by that machine.

Cross-examination.

I do not know a man named Davis of the Pacific Vinegar Works or the California Vinegar Works,

(Testimony of Victor V. Greco.)

but I know of him. I do not think he made Salsa De Pomidoro that year. I think he started to make it in 1917. He uses the old primitive method of an open kettle, the way they made it in Sicily before the modern method was adopted. The open kettle method is pots and open kettles. You put the pulp in there and cook it down to the consistency that is proper, but it does not make a good quality. That is the old method, and the method we were using is the new method, the modern method as adopted in Naples several years ago, prior to the manufacture of the product in this country.

Testimony of Charles A. Davis, for Plaintiff (In Rebuttal).

CHARLES A. DAVIS was thereupon called as a witness by plaintiff in rebuttal, and testified as follows:

I live in Alameda County and am in the packing business in San Francisco. The name of my firm is California Conserving Company, and I am general manager. Have been in the business about 30 years, packing vegetables, fruit and the like, including tomatoes. During that time I have packed tomato paste known as Salsa De Pomidoro. I am familiar with the product. In my experience in the packing business I have had an opportunity to make myself familiar with the terms used in the trade. I am familiar with the term "short pack" as used in packing and selling products. It simply

(Testimony of Charles A. Davis.)

means that if you are supposed to pack 50,000 cases of goods, for instance, and you only pack 25,000, on account of the fact that the ground or acreage that you had set aside or reserved [156—121] for that purpose did not produce any more than that amount, and the contracts booked by the trade have therein a clause which excuses or excepts the manufacturer and producer from being called upon to deliver more than the acreage did make it possible for him to produce.

The COURT.—Do I understand that it refers to a failure or a partial failure of the crop from one cause or another? A. Yes, principally.

The WITNESS.—(Continuing.) I am familiar with the method of making this tomato paste known as Salsa De Pomidoro. There are two methods that have been tried, two that I have tried. One is what they call the vacuum pan process and the other the open kettle process. I have made Salsa De Pomidoro with the vacuum pan process as near as I can recall either in 1915 or 1916. I used vacuum copper kettles. It is a closed process, used to concentrate quickly and freely. Describing the appliance, it is a copper kettle with a closed top, buckled down with a manhole plate in it. Then you do your cooking in there, and everything is concentrated right in that enclosed affair. It is very plain and simple; there is nothing much to it. That vacuum pan that I used ha*ve* no tubes in it. I am not familiar with the method of the vacuum pan that has tubes in it, through which the paste is

(Testimony of Charles A. Davis.)

drawn. The other method of making the Salsa De Pomidoro is the open kettle method. We are not making the Salsa De Pomidoro now. We were this season. We were making it in 1916, with the open kettle. We think we get a good product with the open kettle. The open kettle method is simply cooking in kettles that are open-topped, from which the steam is emitted, and after a certain period of cooking that concentrates down to this same relative consistency as is obtained in the vacuum kettle. It is a process [157—122] of cooking down.

The COURT.—Q. Does it take longer by one method than the other?

A. Yes. This open kettle method is the longest, because there is less concentration of heat.

Mr. LANNIGAN.—Q. As to the two methods you used, which do you consider the best?

A. The open kettle.

Q. You used that yourself? A. Yes.

The WITNESS.—(Continuing.) We manufactured it in 1915 or 1916. The first year we had this vacuum pan, I think it was 1915, and in 1916 we resorted to the open kettle method, and have since stuck right to it, and have increased our capacity from year to year in the same since.

Q. Do you remember whether there was any shortage of material or fruit in 1915?

A. 1915 I am not so sure of, your Honor. 1916 I am more acquainted with. 1915 I could not recall with any certainty.

(Testimony of Charles A. Davis.)

Cross-examination.

Mr. McNAB.—Q. Mr. Davis, in 1915 is it not true that nearly all the packers put up such a large pack that they had an excess quantity carried over into 1916? A. I don't know that.

Q. Do you know whether or not it is true that the majority of the canners carrying tomato products in Central California declined to write up orders in 1916 on the ground that they had such an excess product over from 1915 and thereby in 1916 many of them were able to make full deliveries?

A. I don't know that.

Q. What were the crop conditions in 1916?

A. We delivered 58%.

Q. Of what various products?

A. Tomato paste.

WITNESS.—(Continuing.) As near as I can recall we had contracted [158—123] to deliver 45,000 cases—between 45,000 and 50,000 cases, that we were under contract to deliver, and we actually did deliver only 58% of that.

Q. Did your contract clause permit you to pro rate delivery in case of short pack?

A. Just like the canners' contract.

Q. It is the canners' regular contract?

A. Yes, the same thing as is in common use in San Francisco.

Q. What was the reason for making a short pack during 1916, Mr. Davis?

A. We made our deliveries based upon the production of our acreage.

(Testimony of Charles A. Davis.)

WITNESS.—(Continuing.) Our acreage is in Alameda County. We were able to pick our entire acreage. Our acreage, however, fell short of our estimate. We were only able to deliver 58%. By pro rate delivery I mean a percentage delivery—an equal percentage as the entire contract is related to the amount that we actually were able to deliver. You understand when I say 58%, that is the average, some people, for instance, getting maybe more than 58% and some 55. That is because we made delivery early in the season, before we knew what we were going to have. That is quite customary in the trade with us. I would not care to answer whether it is customary with all packers. The question of short pack is one which comes up practically every year with every canner, more or less, in some variety of product.

Q. That is, nearly every packer, big and little, who is producing a variety of products, makes a short pack on one or the other of his products?

A. So it seems to be.

WITNESS.—(Continuing.) It is not a question that is very frequently disputed or investigated by purchasers, as long as there is good faith. It is true that in determining whether or not the packer has a right to make a short pack his good faith in making [159—124] efforts to try to do his utmost is considered by the trade. Short acreage is the only reason that we would advance in connection with our particular establishment.

The COURT.—What are we trying to get at, Mr.

(Testimony of Charles A. Davis.)

Davis, is the understanding of the trade, generally, as to what that term implies as a basis for a short pack.

A. Well, this contract reads in the event of strikes, or fires, or causes beyond control, etc., but materially speaking I would say that the only reason that larger deliveries or more complete deliveries are not made as a general rule is because of the fact that the acreage does not produce.

Q. That there is a failure of production of crop?

A. For instance, we base our contract, or rather, our estimated returns from an acre of tomatoes, we will say, of 10 tons; naturally, if we got five, or if we got six, we could only make 50 or 60 per cent of our total delivery, or thereabouts. If we should get 12 or 15, then we would have an excess.

The COURT.—Q. I was going to ask the witness if it has ever, in his observation, fallen within that term, in the understanding of the trade, trouble with machinery, the producing machinery or the vacuum machinery that causes delays—if that term short pack would cover a failure on that ground?

A. Your Honor, I would only answer that question by stating that we have never experienced any such trouble, and I don't know of any one that has, so that I could not say.

Mr. McNAB.—Q. You don't know, then, what the general trade rule would be on that?

A. I do not.

WITNESS.—(Continuing.) That was our second year. The first year we used the vacuum and

(Testimony of Charles A. Davis.)

open kettle. I could not answer whether we made full delivery in 1915. [160—125]

Q. Now, assume that you contracted to deliver 45,000 cases, Mr. Davis, and your machinery, your vacuum process, or whatever you call it, failed to operate to your satisfaction, notwithstanding you put all your efforts into making it go and you were not able to produce the amount that you had contracted for, would you consider that a justifiable reason for prorating the short pack?

A. I guess I would have to; if it was so, I could not do otherwise.

Q. What I am getting at is, in the trade, the question of the good faith of the packer in endeavoring to do his utmost to produce is considered?

A. That is the basic principle upon which we work and handle our business, if we can do a thing and it is within the realm of possibility to do it, we do it; if we cannot do it, we give a good reason as to why we do not.

Q. As a matter of fact, these excuses in trade, or reasons, cover quite a variety of reasons, do they not? A. They do.

Q. It is not customary in the trade for those to be disputed by the purchaser where the canner has been doing his utmost in good faith to fulfill, is it?

A. We have never experienced any.

WITNESS.—(Continuing.) The canners' contract is quite an extensive contract.

There was thereupon handed to the witness and considered by the Court, by consent of both parties,

(Testimony of Charles A. Davis.)

the canners' league of California form of contract. The clause relating to short pack therein reads as follows:

"In case of short pack, or government commandeer, requisition or reservation, by reason of which seller is unable to make full delivery of any of the goods specified, delivery shall be prorated . . . If seller shall be unable to perform any or all of [161—126] its obligation by reason of strike, flood, fire, crop damage, failure of transportation facilities, or for any cause or condition beyond seller's control, such obligations shall at once terminate and cease."

WITNESS.—(Continuing and referring to the contract.) I think that is the one they recommended. We have changed ours somewhat, but the release clause or exception we have continued to carry out.

Thereupon a colloquy between Court and counsel in discussing respective views as to said contract took place.

WITNESS. — (Continuing.) This Canners' League contract which the Court is now examining has been elaborated within the last year or two and particularly during the war. It contained originally I think a provision simply saying in case of short pack delivery could be prorated. The application, however, of that clause, has not been extended in practice any more in the last few years than it was before. I think I first started to manufacture Salsa De Pomidoro in 1915. That was our first

(Testimony of Charles A. Davis.)

year, and we did not pack so much. We considered it more or less of an experiment then. We never had made it before. We had our superintendent for the purpose of producing the pack. He was not an Italian.

Q. Had he ever had any particular experience in the manufacture of the commodity?

A. Experimented only.

Q. He had experimented only. About how long had he experimented? A. A year.

WITNESS.—(Continuing.) I did not make inquiries to determine whether or not there was any machinery made in America, specifically manufactured for the purpose of producing the product known as Salsa De Pomidoro.

Q. You made no inquiry?

A. Because there was none available. [162—127]

Q. What do you mean, no machinery available?

A. Not at that time, not for the making of that particular article.

The COURT.—It never had been produced in America before? A. No.

Mr. McNAB.—Q. That is, there was no machinery produced in America for the making of that article? A. Not as far as I know.

WITNESS.—(Continuing.) The machinery that I subsequently utilized for the purpose was machinery manufactured for general purposes which I utilized for that specific purpose. The vacuum process that I used had compression tubes, but not inserts. It had circulating tubes.

(Testimony of Charles A. Davis.)

Mr. McNAB.—Q. The machine which we have under consideration in this particular case had 204 tubes over each pan; did your machine have any such equipment? A. No.

The COURT.—And the process involved a forcing of the material being treated through these tubes, instead of being boiled in pans; it was forced through these tubes, and the evidence tends to show that by reason of the rotation of intense heat, that in passing through these tubes, about an inch in diameter, this material would become baked and hardened, and clog up and choke up the tubes, and stop the whole process.

A. No, that is a new one on me.

Q. Your method did not involve that?

A. No, nothing of that character.

Mr. McNAB.—Do you know anything as to the comparative methods of the product produced by you and by the Greco Canning Company? Did you ever have occasion to compare them?

A. No.

WITNESS.—(Continuing.) I don't know, either in trade or otherwise, what their relative consistency or flavor was. I don't [163—128] know that it is true that as manufactured by the open kettle process one fails to get the same flavor that you do by the vacuum process. I don't know whether that is true or not. As a matter of fact I know that in the manufacture of the Italian commodity known as Salsa De Pomidoro there is a peculiar kind manufactured in and about Naples

(Testimony of Charles A. Davis.)

known as the Naples variety. I do not know whether it is manufactured by the vacuum process or not, nor do I know as a matter of fact that it is a very highly flavored and desirable article among the Italians. I didn't know that a firm by the name of Krenz & Company were in 1916 engaged in attempting to perfect machinery for the production of this particular commodity.

Mr. McNAB.—Q. There was no machinery that you know of that had been manufactured in America specifically for the producing of this commodity? A. Yes.

Q. Your answer is what?

The COURT.—You said there had been none, and he answered affirmatively, of course, that there had been none. If he said no, then that would have negatived your inquiry.

Mr. McNAB.—I understood the witness, but on the printed page of the transcript it might look differently. You mean there was no such machinery?

WITNESS.—(Continuing.) I have seen the Italian product now and then. I have never made the comparison between the product produced in Sicily by the open kettle method and the product produced in and around Naples. I don't know as a matter of fact that the commodity known as Salsa De Pomidoro produced by the open kettle method in Sicily is not considered generally acceptable by the trade in this country. I don't know one way or the other.

Mr. McNAB.—Q. Well, now, do you say that if

(Testimony of Charles A. Davis.)

you contracted, [164—129] Mr. Davis, to produce a given quantity of the product and you based your contracts on your estimate of what your acreage will produce, and your acreage, although you pick it clean, fails to produce the quantity that you had contracted for, that nevertheless the trade recognizes that is a justifiable reason for short pack?

A. They have always in our particular case.

Q. And have done that before this Canners' League contract was elaborated to its present condition?

A. They have done that, I will say, since including 1916.

Q. So long as you have had experience with the trade, is it not a fact that regardless of what the law might be in holding a man to a contract, has not the trade, where in good faith you make a mistake in your estimate of what you can produce from your acreage, and you fail to produce a requisite quantity, has the trade not universally recognized that as a justifiable reason for short pack?

A. I understand the question. On such occasions as we have had to go to the trade with excuses or reasons for short pack, my reasons or excuses have always been acceptable.

The COURT.—What were those reasons? That is not an answer to the question. He has given you a specific ground for failure, and he is asking you if the trade would recognize that. If you don't know, say so.

A. Yes, your Honor, I know it, in this sense only,

(Testimony of Charles A. Davis.)

that, for instance, if we have 1,000 acres of tomatoes contracted for and we have based our future sales, as it were, on the extent of getting 10 tons to an acre and then through weather conditions or some unforeseen condition arises, should we only get a yield of five tons to an acre—

The COURT.—The witness is not answering the question at all, [165—130] but has a different thing in mind. . . . It does not make any difference. I want the witness to answer the question that is put to him. Read it. (Question read.)

A. Yes.

Mr. McNAB.—Q. Universally, a destruction of crop by weather conditions is recognized as a justifiable reason for short delivery, is it not?

A. Yes.

Redirect Examination.

We had our superintendent experiment for approximately a year with this paste-making machinery before we sold it. You see, we had southern tomatoes, then we had northern tomatoes, whenever we could get tomatoes, at various times, and send those tomatoes to our factory. During that time we were not selling any of the paste while we were experimenting with it. We did not try to sell it to anybody. We did not want to experiment with paste.

Recross-examination.

This experimenting was only on a small scale, just with a kettle and seeing whether or not we could produce a proper consistency by cooking.

Testimony of Charles H. Bentley, for Plaintiff (In Rebuttal).

CHARLES H. BENTLEY, called by the plaintiff in rebuttal and testified:

I am with the California Packing Corporation. That used to be the California Fruit Canners Association, and that corporation has succeeded to the California Fruit Canners Association as well as other concerns. I am general sales manager. I have been in the business of packing fruits and vegetables for upwards of 35 years. During that time I have had occasion to familiarize myself [166—131] with the meaning of trade terms that are used in contracts of sale. I am familiar with the term used in tomato contracts, "short pack." This condition in the selling contract as generally used is the outcome of the effort to divide the hazard of crops. The custom is for the canner to contract with the growers early in the year, not for a specific number of tons, but for a given acreage, the canner assuming a large part of the risk of the out-turn, because he has certain overhead expenses to meet regardless of the crop yield; accordingly, he goes to the trade and sells for forward delivery, and bases his sales, usually, on a conservative estimate of the yield he may expect from the acreage he has under control; and in selling on a pro rate contract for delivery, after packing he asks the wholesaler to assume with him a part of the crop hazards; the grower would have no liability in the case of the utter failure of the crop, and,

(Testimony of Charles H. Bentley.)

on the other hand, in most cases the canner would have to take whatever would be produced on that acreage. Accordingly, the trade has recognized the need and the fairness of the prorate contract, based on what is known as the short pack.

The COURT.—Now, then, if I understand that, Mr. Bentley, the term "short pack" relates to and covers an inability to make a pack sufficient to fulfill contracts in their entirety through failure of the crop, from one cause or another.

A. Through failure of the crop, and the contracts, as a rule, then provide for protection against other hazards in the way of natural hazards.

Q. The question simply covers now the meaning of that term "short pack"—what that covers; the others are, as you say, covered by other terms, strikes, fires, etc., I suppose.

A. Strikes, fires, floods, natural causes beyond control, natural [167—132] causes for a prorate delivery.

WITNESS. — (Continuing). The California Packing Corporation own and operate a cannery in the Santa Clara Valley called the Central California Canneries. In 1916 the California Packing Corporation made fully delivery on its sales of tomatoes and tomato products from the pack of that plant, as well as its other plants, 100% delivery.

Cross-examination.

I don't recall how many acres they had under lease or contract for delivery to us. Most of those contracts ran with people who are not the owners of the

(Testimony of Charles H. Bentley.)

property, but lessees of the property. They may be migratory people, who may be on this ranch this year and on another ranch another year. As a matter of fact, I think they would hardly be called migratory, however. Generally they are with lessees of property. They are frequently with foreigners, that is, with people who are in the habit of devoting their peculiar abilities to the raising of crops.

Q. Now, did your cannery, in 1915, carry over an excess pack into 1916? A. I do not recall.

Q. Is it not a fact, Mr. Bentley, that in 1915 there was universally throughout the trade not only a full pack, but an excess pack? A. I do not recall.

Q. Is it not a fact, Mr. Bentley, to refresh your recollection, that as a result of the pack carried over there was comparative reluctance on the part of canners in 1916 to sign up an excess contract for delivery?

A. Not as far as I know. I am speaking now with reference to the business of canners all over the State of California.

Q. But in the Santa Clara Valley, you don't know, of course, [168—133] how many acres you had contracted for. I presume that you did go out and try to contract an acreage which would be more than sufficient to supply the wants of your cannery?

A. Yes.

Q. Do you know whether or not you took out of the fields everything that the growers had to offer?

A. It would be impossible to take everything that they had to offer in any season, because there would

(Testimony of Charles H. Bentley.)

undoubtedly be some defective material; there always has been and always will be.

WITNESS.—(Continuing.) In the year 1916, some of the growers that we had contracts with had a portion of their crop destroyed by the weather. Under ordinary conditions we figure 8 tons as the average yield of tomatoes per acre in the Santa Clara Valley. It varies, in that one tract produces very much more to the acre than the other, on account of soil conditions or other peculiarities. They have only gone to 25 tons per acre in certain patches where they are subject to irrigation, and those fields are not in any way typical of the district. I have no data with respect to the amount that is subject to irrigation in the valley, but we have figures indicating that 8 tons is about as fair as we would ordinarily figure in our Santa Clara acreage; that is on an unirrigated patch, on the average of the valley, including the irrigated patches. I should say it was rather unusual to produce between 20 and 25 tons to the acre where they do irrigate; it has happened. I do not know anything concerning the acreage which was under contract for delivery to the Greco Cannery in 1916.

Q. One of the witnesses has testified that his idea would have been 25 tons to the acre, had it not been destroyed. Do you know anything about those particular acreages?

A. I know something of them.

Q. You know that there are such acreages in the Santa Clara Valley [169—134] that produce that much?

(Testimony of Charles H. Bentley.)

A. Yes. As I said before, though, I would not regard that as typical of the district, nor would I regard a man as proceeding conservatively to sell against any such yield in advance.

Q. Now, we are not contending that. Mr. Bentley, what proportion of the crop in tonnage per acre was destroyed in the Santa Clara Valley by weather conditions in 1916?

A. I should not think over 15 to 20 per cent.

WITNESS.—(Continuing.) That is the total estimated tonnage. By estimated tonnage I mean a concervative estimate of what the valley should produce.

Q. Have you any data or figures giving the per cent of destruction by the weather conditions in 1916?

A. Our green fruit department has some figures, I think, bearing on that subject. The circular letters that the sales department issued to the trade during the packing season and at the close of the packing season made reference to the rain damage in a general way, but the final statement was made that we were able to make 100% delivery with the damage that had been done.

Q. Of course, you don't know what excess acreage you had over requirements of your cannery under contract?

A. I know that in accordance with our usual practice we had sold for future delivery approximately 75% of what we could reasonably hope to pack.

(Testimony of Charles H. Bentley.)

WITNESS.—(Continuing.) That was based upon an estimate in advance of what we thought the acreage would produce. In 1916, at none of our canneries, did we produce commercially a commodity known as Salsa De Pomidoro, nor in 1917. We do not now. We produce what we call a tomato sauce, which is somewhat similar, except it has not the same degree of evaporation. It is produced [170—135] in an open kettle. We brand it on the market tomato sauce. It comes in competition with the Salsa De Pomidoro, although of course it is sold at a much less price, on account of the lower degree of evaporation. The commodity commercially known as Salsa De Pomidoro to the Italian trade is an evaporation to the point where it is quite dense, a heavy, thick consistency paste. The Italians use it in making soups, and more particularly in dressing macaroni. In buying it in the concentrated form they regard it as more economical, because they can thin it down with water. As to the failure of the crop in 1916, through weather conditions, it was not serious. I said from 15 to 20%. I should say that the question of short pack is applied to the district in which the canner operates. I heard the latter part of Mr. Davis' testimony.

Mr. McNAB.—Q. Mr. Davis testified that he contracted to deliver about 45,000 or 50,000 cases of a given commodity, that he picked his crop, but he did not produce sufficient tomatoes to produce a given commodity, and he short delivered. Does

(Testimony of Charles H. Bentley.)

the element of good faith on the part of the packer enter into this matter at all? A. Very much.

Q. If regardless of law, now, Mr. Bentley, and coming down to the custom of the trade, a packer of repute to the knowledge of the trade has done everything apparently within his power in good faith to produce a product and has not been able to do so, isn't that taken into consideration in determining whether he is justified in short delivery?

A. It is taken into consideration, doubtless, but at the same time I think that the trade would expect a man to use ordinary diligence and intelligence.

Q. Assuming that a packer is a man of good reputation in the trade, and he exercises, to the knowledge of the trade, good faith in [171—136] trying to produce a sufficient amount of a given commodity to satisfy his contracts, and uses ordinary diligence, in order to produce it, aren't those factors taken into consideration in determining whether he is justified in making a short delivery?

A. If you add average ordinary diligence in selecting the acreage of ground in which his crop was to be provided. If I may illustrate the point I have in mind, not a year like the past year, where there was an extraordinary demand and many people attempted to plant tomatoes in districts which were not proven and where the soil was not suitable—the trade would not accept that as a justifiable ground for short pack, feeling that the

(Testimony of Charles H. Bentley.)

entire risk of an experiment of that kind ought not to be put upon the trade.

Q. Assuming that a packer estimates in good faith and on the average yield of the acreage that he would have under contract or would have delivered 5,500 tons at his plant; as a matter of fact, on account of weather conditions they deliver at the cannery only 2,400 tons, you would consider, would you not, that he had used proper precautions and ordinary diligence with regard to protecting his interests?

A. It would depend entirely on how many acres he was figuring on getting that from and the character of the acreage.

Q. About 550 acres.

A. We would not regard 10 tons an acre as a conservative estimate in the Santa Clara Valley.

Q. Taking your estimate of 8 tons to the acre, Mr. Bentley, which would be 4,400 tons, would it not? A. Yes.

Q. Now, let us disregard the testimony of some witnesses here who said that they picked nearly 25 tons to the acre; let us take your estimated production of 8 tons on 550 acres, which would make 4,400 tons under contract, and they actually only delivered 2,400 tons. Now, was that not more than a sufficient estimate of the needs of [172—137] his cannery?

A. Well, there might have been other factors entering in.

(Testimony of Charles H. Bentley.)

WITNESS.—(Continuing.) If he got all of the yield on his acreage and that was fairly typical of the conditions in that district, I should say that the trade would release him from liability if he delivered all that he could reasonably expect to pack out of the acreage that was selected with reasonable care and diligence. We would figure that we were safe in selling up to 8 tons to the acre on typical acreage, provided it was proven ground. In 1919 our cannery delivered 100% No. 2½ cans, solid pack, and we only delivered between 85 and 90% of No. 2. They are made out of the same tomato, but we had a railroad strike during the canning season, when we were unable to get cans for several days, and in fact it ran into a considerable period of that time; during that time the tin plate was short on the size of the plate from which No. 2 cans are made.

Mr. McNAB.—Q. Well, now, Mr. Bentley, assuming that you contracted for a sufficient number of cans, and the cannery failed to deliver to you the requisite number of cans, under the short pack clause, aren't you justified in making pro rate delivery?

A. Under any conditions beyond our control—if the canner fails on account of a railroad strike his contract protects him just as ours protects us.

WITNESS.—(Continuing.) I question very much whether we would have any right to expect the trade to protect us, unless the shortage of cans arose from conditions such as I have named, that

(Testimony of Charles H. Bentley.)

is, a strike; the can company would certainly protect us against failure to deliver under our contract in a case of that kind.

The COURT.—Q. In other words, if I understand you, these causes must be things that put it beyond your control? [173—138] A. Precisely.

Q. They do not grow out of any question of your own exercise of diligence and things of that kind?

A. That is exactly the case, your Honor, the whole validity of the canner's contract providing for a pro rate delivery. It depends, as counsel said, very largely on the good faith of the canner. If there was a tendency to bring in extraneous reasons which would excuse him from making a full delivery, it would strike at the validity of the contract and make it impossible for us to deal with the trade on a pro rate contract; consequently, in trade practice and in aspects of the trade, I think I am perfectly safe in saying that the disposition has been, even among the canners themselves, to compel their people in similar lines of business to live strictly up to the terms of the contract and interpret the short pack entirely within what might be regarded as arising only from natural causes; that is to say, a short pack would only be justified where the conditions arose from natural causes.

Mr. McNAB.—Q. You do not mean to say that the Canners' League has restricted the term "short pack" to that narrow limit, do you?

A. I am inclined to think it has.

Mr. McNab thereupon asserted that the secretary

(Testimony of Charles H. Bentley.)

of the Canners' League had testified to the contrary. After a colloquy between Court and counsel witness proceeded: The point I am trying to make, your Honor, is simply, if the industry is able to continue operating along the lines of selling for fall delivery or delivery of the goods to be made hereafter, it is going to continue to divide the crop hazard risk with the grower and with the trade, he must be able at all times to justify his position with the trade and convince the body that he is acting not only in good faith, but that he is acting with reasonable care and diligence, and that he is [174—139] not going to fall back on the short delivery clause of his contract for reasons unless they be extraordinary or unusual, or conditions that are absolutely beyond his control. I recognize the fact that the manufacture of Salsa De Pomidoro was a new commercial business in this country in 1916. I would not go so far as to say that there was no machinery specifically devised in this country for its manufacture. I know that it was perfectly easy to make Salsa De Pomidoro, as it is being done to-day. I am inclined to think that there is some variation in any type of Salsa De Pomidoro, whether made by Greco or anybody else, much depending upon the quality of the materials he is handling, and the particular time in the season. I have seen samples of the commodity he produces. It is an excellent quality and undoubtedly produced with great care.

Mr. McNAB.—Q. Now, this machinery was in-

(Testimony of Charles H. Bentley.)

stalled in 1916, and never therefore, according to the testimony of the witnesses, had been applied to that purpose before. It was a vacuum process containing a large number of tubes, 204 tubes to the pan. It develops that these tubes choked up to the extent that they had to be drilled out with electric drills, sometimes requiring an hour and sometimes days at a time. In the following year that was remedied by discovering that a larger tube would accommodate the material and not stick so easily. Assuming that the canner, with the knowledge of the purchaser, goes out to install machinery and did install the best machinery that he could find adaptable to the purpose, to his knowledge, and operated it conscientiously with his engineers, and in spite of his efforts was unable to produce more than sufficient to make a prorate delivery, would not those causes be taken into consideration by the trade? A. I should think not. [175—140]

Q. You think not. Now, do you know anything at all, Mr. Bentley, concerning the acreage which was under contract to supply the Greco Canning Co. in 1916? A. I do not.

Q. You do not know anything about the tonnage they produced? A. No.

Q. Now, Mr. Bentley, most of these matters in the Canners' League to which you have referred are settled by arbitration, are they not?

A. Usually.

Q. That is, they appoint an arbitration board,

(Testimony of Charles H. Bentley.)

consisting of a grower, a canner, and a wholesale grocer, and they determine the matter, and therefore there are not many suits now?

A. No, there are not.

Q. Prior to the time that the Canners' League reached its present power, suits in regard to these matters were quite frequent, were they not?

A. I think not.

Q. Was your company ever sued?

The COURT.—What is the object of this inquiry? I mean what is the materiality of it?

Mr. McNAB.—I expect to show that every canner in business has been sued on these short packs, and it was determined in most of them that the element of good faith determined the whole transaction; it was not alone limited to crop conditions.

The COURT.—I do not think that would be proper evidence. I do not regard the inquiry you are now directing to the witness as at all material to the case.

Mr. McNAB.—Your Honor will allow us an exception on that?

The COURT.—Yes.

Which exception the defendant hereby specifies as

DEFENDANT'S EXCEPTION No. 6.

By consent there was thereupon received in evidence and marked [176—141]

Defendant's Exhibit "RR," a copy of the official weather report relating to Santa Clara County taken by the Weather Bureau. It reads as follows:

Defendant's Exhibit "RR."

"WEATHER REPORT, 1916.

September Rain 60/100 of an inch falling on the 21st heavily (42/100), the 30th (18/100). No frost.

October Rainfall 84/100 of an inch. Entire fall taking place on the 3d–4th–5th of the month. No frost.

November Rainfall 41/100 of an inch—frequent frosts occurred in the early part of the month with killing frosts on the 14th, 15th & 16th.

The temperature on the morning of the 14th was 26 9/10 °°, being the lowest on record for the month of November.

The following notation appears on the records of the 14th:

"Very severe frost which killed the second crop of grapes & tomatoes."

The mean temperature on above dates was lowest on record for the month." [177—142]

The above constituted the evidence submitted in the case. Thereafter the case was argued before the Court and was taken under advisement.

And on the 30th day of August, 1920, the above-entitled court, Honorable W. C. Van Fleet, Judge thereof, presiding, filed the following written decision concerning the facts and the law in said action:

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 16,076.

Hon. WM. C. VAN FLEET.

P. PASTENE & CO., INCORPORATED, a Corporation,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,

Defendant.

VAN FLEET, District Judge.

Action to recover for breach of contract to manufacture and deliver three thousand (3,000) cases of Salsa De Pomidoro, or Italian tomato paste, in the crop season of 1916.

There was delivery under the contract of but six hundred and sixty-five (665) cases or about twenty-two per cent (22%) of the quantity contracted for, and the action proceeds upon the theory that the plaintiff is entitled to recover upon the basis of a full and complete delivery of the quantity contracted for.

The defense is based on this provision of the contract: [178—143] "In case of short pack, seller agrees to make prorate delivery. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire or other circumstances beyond its control, such obligations shall at

once terminate and cease." The defendant's claim is, in substance, that there was a "short pack" within the meaning of the contract, resulting partly from a very considerable failure in the tomato crop by reason of weather conditions, and partly from trouble with defendant's processing appliances which caused great delay and difficulty; that by reason of these conditions defendant was compelled to make a prorate delivery; that plaintiff received its full *pro rata* of the pack actually made, which was all it was entitled to. The different elements of this defense will be considered.

1. As to a failure of the crop, it is sufficient to say that the evidence, which is more or less conflicting, is not sufficient to sustain that feature of the defense—at least to any such extent as that claimed. There was evidence tending to show that early rains and frosts damaged the crop to some extent and thus decreased production, particularly in the Santa Clara Valley, the territory more immediately surrounding defendant's plant, but it was not only very indefinite as to the real extent of the injury in that valley but wholly so as to the effect in other fields of production in adjacent counties where it appeared the tomato is largely grown; and there being nothing in the terms of the contract requiring that the goods contracted for be produced from tomatoes grown in any particular section, it was essential to sustain this defense, even had there been a more complete failure in the immediate field, to show that the fruit could not have been secured in other parts of the State in

quantity to fulfill the contract. Newall, et al. vs. New Holstein Canning Co., [179—144] 97 N. W. 487. The evidence discloses no such effort in this respect as would establish inability to get the fruit elsewhere or to excuse the failure to perform the contract to the great extent shown. To the contrary I am satisfied that taking all the evidence into consideration and giving the defendant the benefit of every intendment and deduction making in its favor as to failure or damage to the crop, the Court would be wholly unwarranted in finding the defendant justified in abating more than twenty per cent (20%) from a full delivery under its contract.

2. As to the delay and difficulty encountered by defendant from trouble with its paste-making machinery, it is not and indeed could not well be seriously claimed that such a cause would ordinarily came within the definition of a "circumstance beyond its control" which would excuse performance by defendant within the terms of the contract. Carnegie Steel Co. vs. United States, 240 U. S. 156; Morgan Lyall, 16 Quebec K. B. 562; Connersville Wagon Co. vs. McFarlan Carriage Co., 166 Ind. 123; American Bridge Co. vs. Glenmore Distilleries Co., 107 S. W. 279; Credenburgh vs. Baton Rouge Sugar Co., 28 Southern, 122. But the claim under this head is first, that the custom in the packing business is to recognize such causes of delay as justifying a "short pack," and second, that independently of this custom the parties themselves put that construction upon the contract and that the

Court is bound thereby. But the evidence on the subject is too vague, unsatisfactory and conflicting to enable the Court to find the existence of any such custom. It tends strongly, to the contrary, to indicate that nothing is ordinarily regarded by the trade as justifying a "short pack" other than causes beyond the control of the packer such as those stipulated in the contract or of a kindred character. Nor do I think the evidence sustains the contention [180—145] that the parties in their dealings have given the contract any such construction as that contended for. This claim is based solely upon certain passages occurring in the correspondence carried on during the time the goods were being processed. Quite early in the packing season the defendant wrote plaintiff of difficulties being encountered with the processing machinery which were causing delay and that by reason of that and because "the crop this year is very short as we have had considerable rain which has caused much damage," it was predicted that the pack would be as low as twenty-five per cent (25%). In answer the plaintiff wrote expressing regret over the difficulties being encountered and disappointment at the prospect of a "short pack" and, expressing the hope that defendant would find conditions improving, said: "At this time we will only state that if you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you. It is obvious, naturally, of course,

that in any case we shall expect a full *pro rata* delivery of all such goods as you are successful in producing."

There were later references in the correspondence to the same subject but none bearing more definitely on the question of a practical construction of the contract than those given. It is quite obvious that there was nothing in the suggestions made by plaintiff in reply to a recital by defendant of the difficulties encountered which could be seized upon as tending to show that plaintiff was giving the contract a construction in any respect differing from that its language would import. The defendant had mentioned to plaintiff, as one of the difficulties presenting itself, a short crop resulting from weather conditions, a thing [181—146] which plaintiff would at once recognize as justifying or excusing a "short pack" under the very terms of the contract. The answer must be read, as does his next letter in which he makes reference to hearing that weather conditions had improved, as indicating that damage to the crop was what he had in mind in his suggestion about meeting defendant's situation "in reasonable fashion." Very clearly it cannot be construed as an acquiescence in any suggestion which may be gathered from defendant's letters that the latter was relying on the trouble with its machinery as justifying a "short pack."

In construing acts or expressions of the kind relied on as constituting a construction by the parties of a written contract at variance with the

ordinary import of its terms, it is a cardinal rule that "It ought to appear with reasonable certainty that they were acts of both parties done with knowledge and in view of a purpose at least consistent with that to which they are now sought to be applied." Sternbergh vs. Brock, 225 Pa. 279, 287. Here the only information plaintiff has as to conditions confronting the defendant was what those conditions were represented to be by the latter and as to which, as we have seen, the failure of the crop was at least exaggerated. In this respect, therefore, the plaintiff is entitled to rely on the terms of the contract as written.

The further consideration urged by counsel as to the construction to be put upon the contract have not been overlooked but are regarded as inapplicable to its express terms.

The contract price, delivered by defendant f. o. b. cars San Francisco, was Seven Dollars ($7.00) per case and it is stipulated that the market price at the time and place of delivery was Ten Dollars ($10.00) a case. In view of the foregoing considerations, [182—147] plaintiff should have judgment in accord with those figures based upon a delivery of Eighty per cent (80%) of the quantity contracted for, less the quantity already delivered, and for its costs.

Judgment may be entered accordingly.

Thereafter judgment was entered in accordance with the said written decision, to which decision and judgment the defendant duly excepted, and

hereby designates said exception as Defendant's Exception No. 6.

DEFENDANT'S EXCEPTION No. 1.

And the defendant does hereby except to the ruling of the Court set forth in the foregoing record sustaining an objection to the following question propounded to the witness Victor V. Greco, namely: "Was the fact that Salsa De Pomidoro had never been produced in the United States, and that it was in its experimental stage in any way discussed between you and Mr. Pastene?" To which ruling the defendant duly excepted.

DEFENDANT'S EXCEPTION No. 2.

And the defendant does hereby except to the ruling of the Court sustaining an objection to the following question propounded to the witness Milton M. Berne: "Now, I will ask you the question as an expert in the matter: Assuming that a contract had been entered into by one of the parties to this action for production of a product known as Salsa De Pomidoro, which was a domestic product, was a product which had not theretofore been manufactured in America, and the party agreeing to deliver the goods for the first time installed machinery for its manufacture which had theretofore never been used for that purpose and with competent and skilfull and capable engineers operated it as skilfully as you could during the period of the season and was unable on account of the choking up to produce the required amount for his delivery, [183—148] would that be accepted by the trade as a justifiable reason for prorating de-

livery of the short pack?" To which ruling the defendant duly excepted.

DEFENDANT'S EXCEPTION No. 3.

And the defendant does hereby except to the ruling of the Court in overruling the defendant's objection to the introduction in evidence by the plaintiff of a tabulation showing the acres, tons and tons per acre of tomatoes from 1916 to 1918 prepared by the California Packing Corporation and the California Fruit Canners Association, to which ruling the defendant duly excepted.

DEFENDANT'S EXCEPTION No. 4.

And the defendant does hereby except to the ruling of the Court sustaining an objection to the following question asked of the witness R. W. Crary, namely: "Assuming that a canner engages to deliver a given quantity of goods but through unforseen difficulties with his machinery notwithstanding his efforts, he is unable to produce the quantity which he agrees to deliver, state whether or not the trade recognizes that as a justifiable reason for a short pack and a *pro rata* delivery?" To which ruling defendant duly excepted.

DEFENDANT'S EXCEPTION No. 5.

And the defendant does hereby except to the ruling of the Court striking out the answer of the witness R. W. Crary to the question: "What circumstances justifying a short pack would be incorporated under the common acceptation of the trade term 'or other circumstances beyond the packer's control'?" To which ruling defendant duly excepted.

DEFENDANT'S EXCEPTION No. 6.

And the defendant does hereby except to the decision and findings in the nature of a decision filed by Honorable W. C. Van [184—149] Fleet, District Judge in the above-entitled action, in the following particulars:

(a) The Court erred in failing to sustain the defense that there was a failure of crops and that such failure of crops was sufficient to justify the defendant in delivering only a short pack under the terms of its contract;

(b) The Court erred in finding against the defendant's contention that the early rains and frosts damaged the crops to such an extent as to make it impossible to deliver other than a short pack to the plaintiff;

(c) The Court erred in holding and finding that the burden was upon the defendant under its contract to secure tomatoes grown in other sections than the Santa Clara Valley and requiring the defendant to purchase tomatoes regardless of location;

(d) The Court erred in finding and holding that the burden was upon defendant to show that fruit for the purposes of fulfilling the contract could not have been secured in other parts of the State than the particular locality in which the cannery of the defendant was located;

(e) The Court erred in fact and in law in holding and finding that the evidence failed to disclose an effort on the part of the defendant to secure canning tomatoes in sections other than the Santa Clara Valley;

(f) The Court erred in holding and finding that the defendant was justified in abating his contract only to the extent of 20% from a full delivery;

(g) The Court erred in holding and finding that the phrase "circumstances beyond its control" did not include circumstances preventing the defendant from fulfilling his contract in terms;

(h) The Court erred in finding that there was no custom [185—150] making a failure under the circumstances asserted by the defendant and shown by the evidence to be within a custom of the trade recognizing the right to deliver a short pack;

(i) The Court erred in holding and finding that nothing is regarded by the trade as justifying a short pack other than causes beyond the control of the packer such as those stipulated in the contract or of a kindred character;

(j) The Court erred in holding and finding that the evidence did not sustain tthe contention that the parties in their dealings have given the contract the construction contended for by defendant;

(k) The Court erred in holding and finding that the plaintiff in his correspondence had not waived objections to the delivery of a short pack and had recognized the impossibility of the defendant delivering in full under the contract;

(l) The Court erred in holding and finding that it was possible for the defendant to have procured canning fruit in other localities than those adjacent to the cannery in view of the uncontradicted evidence that fruit for the peculiar product must be

secured in the immediate vicinity and be immediately manufactured when picked;

(m) The Court erred in holding and finding that the plaintiff in its correspondence, in which it stated, "If you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you," did not have a reference to the conditions relating to machinery and did not intend by such correspondence to waive the delivery of a short pack;

(n) The Court erred in holding and finding that the defendant [186—151] did not deliver the full *pro rata* to the plaintiff to which plaintiff was entitled;

(o) The Court erred in holding that the correspondence of the plaintiff was not in effect an acknowledgment of the necessity for a short pack on the part of the defendant;

(p) The Court erred in holding and finding that the plaintiff's correspondence and letters acknowledging letters from the defendant did not constitute an acquiescence in the delivery of a short pack by the defendant and the necessity therefor;

(q) The Court erred in holding and finding that the plaintiff was entitled to a judgment based upon a delivery of 80% of the quantity contracted for, less the quantity already delivered, and for its costs.

In each of the foregoing specifications of error in the rulings and the decision of the Court the defendant hereby notes an exception.

Order Settling and Allowing Bill of Exceptions.

I, the undersigned, Judge of the District Court of the United States, who presided at the trial of the above-entitled action, do hereby certify that the foregoing bill of exceptions, having been presented by the defendant within the time allowed by law therefor, is a true and correct copy of the proceedings had at the trial of said action, and I do hereby settle and allow the same and order that the said Bill be filed with the clerk of the court.

Dated: June 20, 1921.

(Sgd.) WM. C. VAN FLEET,
District Judge. [187—152]

Stipulation for Allowance of Bill of Exceptions.

It is hereby stipulated and agreed that the foregoing bill of exceptions was presented by defendant within the time allowed by law therefor, that the same is a true and correct copy of the proceedings had at the trial of the above-entitled action, and that the same may be certified, allowed and settled as the bill of exceptions in the above-entitled action as provided by law and the practice of this court.

THOMAS, BEEDY & LANAGAN,
Attorney for Plaintiff.
JOHN L. McNAB,
C. C. COOLIDGE,
Attorneys for Defendant.

[Endorsed]: Filed Jun. 20, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [188—153]

(Title of Court and Cause).

Assignment of Errors.

Comes now the defendant above named and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled action, from the judgment made by this Honorable Court on the 30th day of August, 1920:

I.

That the above-named District Court erred in overruling the demurrer interposed by the defendant and appellant to the original complaint filed in the cause.

II.

That the above-named District Court erred in rendering judgment in said action in favor of the plaintiff and respondent and against the defendant and appellant.

III.

That the above-named District Court erred in sustaining an objection to the following question propounded to the witness Victor V. Greco, namely:

> "Was the fact that Salsa De Pomidoro had never been produced in the United States and that it was in its experimental stage in any way discussed between you and Mr. Pastene?"

which ruling is designated in the bill of exceptions herein, as Defendant's Exception No. 1.

IV.

That the said District Court erred in sustaining

an objection to the following question propounded to the witness Milton M. Berne:

> "Now, I will ask you the question as an expert in the matter: Assuming that a contract had been entered into by one of the parties to this action for the production of a product known as Salsa De Pomidoro, which was a domestic product, was a product which had not theretofore been manufactured in America, and the party agreeing to deliver the goods for the first time installed machinery for its manufacture which had theretofore never been [189] used for that purpose and with competent and skillful and capable engineers operated it as skillfully as you could during the period of the season and was unable on account of the choking up to produce the required amount for his delivery, would that be accepted by the trade as a justifiable reason for prorating delivery of the short pack?"

which ruling is designated in the bill of exceptions herein as Defendant's Exception No. 2.

V.

That the said District Court erred in overruling defendant's objection to the introduction in evidence by the plaintiff of a tabulation showing the acres, tons and tons per acre of tomatoes from 1916 to 1918, prepared by the California Packing Corporation and the California Fruit Canners Association, by which said ruling is designated in the bill of exceptions herein as Defendant's Exception No. 3.

VI.

That the said District Court erred in sustaining an objection to the following question asked of the witness R. W. Crary, namely:

> "Assuming that a canner engages to deliver a given quantity of goods but through unforeseen difficulties with his machinery notwithstanding his efforts, he is unable to produce the quantity which he agrees to deliver, state whether or not the trade recognizes that as a justifiable reason for a short pack and a *pro rata* delivery?"

which said ruling is designated in the bill of exceptions herein as Defendant's Exception No. 4.

VII.

That the said District Court erred in striking out the answer of the witness R. W. Crary to the question:

> "What circumstances justifying a short pack would be incorporated under the common acceptation of the trade term 'or other circumstances beyond the packer's control'?"

which said ruling is designated in the bill of exceptions as Defendant's Exception No. 5. [190]

VIII.

That the said District Court erred in rendering its decision in favor of the plaintiff and against the defendant for the reason that said decision is against law.

IX.

That the said District Court erred in rendering

judgment in favor of the plaintiff and against the defendant for the reason that said judgment is contrary to the evidence and the law applicable thereto.

X.

That the said District Court erred in making its decision and findings in the nature of a decision filed by the Honorable W. C. Van Fleet, District Judge in the above-entitled action in the following particulars:

(a) The Court erred in failing to sustain the defense that there was a failure of crops and that such failure of crops was sufficient to justify the defendant in delivering only a short pack under the terms of its contract.

(b) The Court erred in finding against the defendant's contention that the early rains and frosts damaged the crops to such an extent as to make it impossible to deliver other than a short pack to the plaintiff.

(c) The Court erred in holding and finding that the burden was upon the defendant under its contract to secure tomatoes grown in other sections than the Santa Clara Valley and requiring the defendant to purchase tomatoes regardless of location.

(d) The Court erred in finding and holding that the burden was upon defendant to show that fruit for the purposes of fulfilling the contract could not have been secured in other parts of the State than the particular locality in which the cannery of the defendant was located. [191]

(e) The Court erred in fact and in law in holding and finding that the evidence failed to disclose an effort on the part of the defendant to secure canning tomatoes in sections other than the Santa Clara Valley.

(f) The Court erred in holding and finding that the defendant was justified in abating his contract only to the extent of 20% from a full delivery.

(g) The Court erred in holding and finding that the phrase "circumstances beyond its control" did not include circumstances preventing the defendant from fulfilling his contract in terms.

(h) The Court erred in finding that there was no custom making a failure under the circumstances asserted by the defendant and shown by the evidence to be within a custom of the trade recognizing the right to deliver a short pack.

(i) The Court erred in holding and finding that nothing is regarded by the trade as justifying a short pack other than causes beyond the control of the packer such as those stipulated in the contract or of a kindred character.

(j) The Court erred in holding and finding that the evidence did not sustain the contention that the parties in their dealings have given the contract the construction contended for by defendant.

(k) The Court erred in holding and finding that the plaintiff in his correspondence had not

waived objections to the delivery of a short pack and had recognized the impossibilities of the defendant delivering in full under the contract.

(l) The Court erred in holding and finding that it was possible for the defendant to have procured canning fruit in other localities than those adjacent to the cannery in view of the uncontradicted evidence that fruit for the peculiar product [192] must be secured in the immediate vicinity and be immediately manufactured when picked.

(m) The Court erred in holding and finding that the plaintiff in its correspondence, in which it stated, "If you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you," did not have a reference to the conditions relating to machinery and did not intend by such correspondence to waive the delivery of a short pack.

(n) The Court erred in holding and finding that the defendant did not deliver the full *pro rata* to the plaintiff to which plaintiff was entitled.

(o) The Court erred in holding that the correspondence of the plaintiff was not in effect an acknowledgment of the necessity for a short pack on the part of the defendant.

(p) The Court erred in holding and finding that the plaintiff's correspondence and letters acknowledging letters from the defendant did not constitute an acquiescence in the delivery of a short pack by the defendant and the necessity therefor.

(q) The Court erred in holding and finding that the plaintiff was entitled to a judgment based upon a delivery of 80% of the quantity contracted for, less the quantity already delivered, and for its costs.

to which ruling, decision and findings in the nature of a decision as found by said Judge, defendant excepts and which said ruling is designated in the bill of exceptions herein as Defendant's Exception No. 6.

WHEREFORE said defendant prays that the judgment of the District Court of the United States in and for the Northern [193] District of California, Second Division, be reversed, and that said cause may be remanded to the United States District Court in and for the Northern District of California, with instructions to said Court to enter for defendant.

JOHN L. McNAB,
C. C. COOLIDGE,
Attorneys for Defendant.

Due service and receipt of a copy of the within assignment of errors is hereby admitted this 19th day of February, 1921.

THOMAS, BEEDY & LANAGAN,
Attorneys for Plff.

[Endorsed]: Filed Feb. 21, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [194]

(Title of Court and Cause.)

Petition for Writ of Error.

Greco Canning Company, a corporation organized and existing under and by virtue of the laws of the State of California, defendant in the above-entitled action, feeling itself aggrieved by the verdict of the Court and the judgment entered herein on the 30th day of August, 1920, comes now by Messrs. John L. McNab and C. C. Coolidge, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that a citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules in such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

JOHN L. McNAB,
C. C. COOLIDGE,
Attorneys for Defendant.

Due service and receipt of a copy of the within petition is hereby admitted this 19th day of Feb. 1921.

THOMAS, BEEDY & LANAGAN,
Attys. for Plff.

[Endorsed]: Filed Feb. 21, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [195]

(Title of Court and Cause.)

Order Allowing Writ of Error and Fixing Amount of Bond.

Upon motion of John L. McNab and C. C. Coolidge, attorneys for the above-named defendant, and upon filing a petition for a writ of error and assignment of errors:

IT IS ORDERED that the writ of error be, and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein on the 30th day of August, 1920, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the amount of the bond on said writ of error be, and it is hereby, fixed at the sum of $300.00.

Dated: February 21, 1921.

FRANK H. RUDKIN,
United States District Judge.

[Endorsed]: Filed Feb. 21, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [196]

No. 30321–21. $300.00.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

BALTIMORE, MARYLAND.

In the District Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, Second Division.

P. PASTENE & CO., INCORPORATED, a Corporation,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Greco Canning Co., a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation, having its principal place of business in the city of Baltimore, State of Maryland, and having a paid-up capital of Four Million Five Hundred Thousand Dollars ($4,500,000), duly incorporated under the laws of the State of Maryland, for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all the requirements of the laws of the State of California and United States

of America respecting such corporations, are held and firmly bound unto plaintiff in the sum of Three Hundred Dollars ($300.00), lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, by these presents.

Sealed with our seals and dated this 23d day of February, 1921.

WHEREAS, the above-named defendant has prosecuted a writ of [197] error to the United States Circuit Court of Appeals, Ninth Circuit, to reverse the judgment of the District Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, Second Division, in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant shall prosecute its said appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

GRECO CANNING CO.
By BYRON COLEMAN,
Principal.

UNITED STATES FIDELITY AND GUARANTY COMPANY.
[Seal] By HENRY V. D. JOHNS,
Attorney in Fact.
By ERNEST W. SWINGLEY,
Attorney in Fact.

(Premium charged for this bond is $10.00 per annum.)

Approved as to form and sufficiency of sureties.

FRANK H. RUDKIN,
U. S. District Judge.

[Endorsed]: Filed Feb. 26, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [198]

(Title of Court and Cause.)

Praecipe for Transcript of Record on Writ of Error.

To Walter B. Maling, Clerk of the District Court Above Named:

YOU WILL PLEASE PREPARE the record for the transcript to be printed in the above-entitled action upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit and incorporate therein the following papers:

1. Complaint.
2. Demurrer to complaint.
3. Answer of defendant.
4. Opinion of the District Judge.
5. Judgment.
6. Stipulation waiving jury.
7. Bill of exceptions.
8. Petition for writ of error.
9. Order allowing writ of error and fixing amount of bond.
10. Writ of error.
11. Bond.

12. Assignment of errors.
13. Citation on writ of error.

JOHN L. McNAB,
C. C. COOLIDGE,
Attorneys for Plaintiff in Error.

Receipt of a copy of the within praecipe is hereby admitted this 26th day of Feb., 1921.

THOMAS, BEEDY & LANAGAN,
Attorneys for Plff.

[Endorsed]: Filed Feb. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [199]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,076.

P. PASTENE & CO., INCORPORATED, a Corporation,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing one hundred ninety-nine (199) pages, numbered from 1 to 199, inclusive, to be full, true and correct copies of

the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $87.75; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 12th day of August, A. D. 1921.

[Seal] WALTER B. MALING,

Clerk United States District Court for the Northern District of California. [200]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between P. Pastene & Co., Incorporated, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said Greco

Canning Co., a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 26th day of February, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by:

FRANK H. RUDKIN,
United States District Judge. [201]

Receipt of a copy of the within writ of error is hereby admitted this 26th day of Feb. 1921.

_____,

THOMAS, BEEDY & LANAGAN,
Attorneys for Pltf.

[Endorsed]. No. 16,076. United States District Court for the Northern District of California. Greco Canning Co., a Corporation, Plaintiff in Error, vs. P. Pastene & Co., Incorporated, a Corporation, Defendant in Error. Writ of Error. Filed Feb. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [202]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to P. Pastene & Co., Incorporated, a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein Greco Canning Co., a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, United States District Judge for the Northern District of California, this 26th day of February, A. D. 1921.

FRANK H. RUDKIN,

United States District Judge. [203]

Due service and receipt of a copy of the within citation is hereby admitted this 26th day of Feb., 1921.

THOMAS, BEEDY & LANAGAN,

_____,

Attorneys for Pltf.

[Endorsed]: No. 16,076. United States District Court for the Northern District of California. Greco Canning Co., a Corporation, Plaintiff in Error, vs. P. Pastene & Co., Incorporated, a Corporation, Defendant in Error. Citation on Writ of Error. Filed Feb. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3750. United States Circuit Court of Appeals for the Ninth Circuit. Greco Canning Company, a Corporation, Plaintiff in Error, vs. P. Pastene & Company, Incorporated, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed August 12, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. ——

GRECO CANNING CO., a Corporation,

Appellant,

vs.

P. PASTENE & CO., INCORPORATED, a Corporation,

Appellee.

Order Extending Time to and Including April 28, 1921, to File Record and Docket Cause.

GOOD CAUSE BEING SHOWN, it is hereby ORDERED that the appellant in the above-entitled cause may have to and including April 28th, 1921, within which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 24th, 1921.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: No. 3750. United States Circuit Court of Appeals for the Ninth Circuit. Greco Canning Co., a Corporation, Appellant, vs. P. Pastene & Co., Incorporated, a Corporation, Appellee. Order Extending Time to Docket Cause. Filed Mar. 25, 1921. F. D. Monckton, Clerk. Refiled Aug. 12, 1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. ——

GRECO CANNING CO., a Corporation,

Appellant,

vs.

P. PASTENE & CO., INCORPORATED, a Corporation,

Appellee.

Order Extending Time to and Including May 28, 1921, to File Record and Docket Cause.

GOOD CAUSE BEING SHOWN, it is hereby ORDERED that the appellant in the above-entitled cause may have to and including May 28th, 1921, within which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 27, 1921.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: No. 3750. United States Circuit Court of Appeals for the Ninth Circuit. Greco Canning Co., a Corporation, Appellant, vs. P. Pastene & Co., Incorporated, a Corporation, Appellee. Order Under Subdivision 1 to Rule 16 Enlarging Time to and Including May 28, 1921, to File Record and Docket Cause. Filed Apr. 27, 1921. F. D. Monckton, Clerk. Refiled Aug. 12, 1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. ——

GRECO CANNING CO., a Corporation,

Appellant,

vs.

P. PASTENE & CO., INCORPORATED, a Corporation,

Appellee.

Order Extending Time to and Including June 28, 1921, to File Record and Docket Cause.

GOOD CAUSE BEING SHOWN, it is hereby ORDERED that the appellant in the above-entitled action may have to and including June 28th, 1921, within which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated May 28, 1921.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: No. 3750. United States Circuit Court of Appeals for the Ninth Circuit. Greco Canning Co., a Corporation, Appellant, vs. P. Pastene & Co., Incorporated, a Corporation, Appellee. Order Extending Time to Docket Cause. Filed May 28, 1921. F. D. Monckton, Clerk. Refiled Aug. 12, 1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. ——

GRECO CANNING CO., a Corporation,

Appellant,

vs.

P. PASTENE & CO., INCORPORATED, a Corporation,

Appellee.

Stipulation and Order Extending Time to and Including July 28, 1921, to File Record and Docket Cause.

It is hereby stipulated that the time for the docketing the above-entitled cause in the Circuit Court of Appeals may be extended to and including the 28th day of July, 1921, and consent is hereby given to the making of an order extending the time for that time.

WM. W. MORROW,

Judge.

ORDER.

It is hereby stipulated on behalf of plaintiff that the Court may make an order extending the time to docket the above-entitled case in the Circuit Court of Appeals thirty days from date.

THOMAS, BEEDY & LANAGAN,

Attorneys for Appellee.

[Endorsed]: No. 3750. United States Circuit Court of Appeals for the Ninth Circuit. Greco Canning Co., a Corporation, Appellant vs. P. Pas-

tene & Co., Incorporated, a Corporation, Appellee. Stipulation. Filed Jun. 28, 1921. F. D. Monckton, Clerk. Refiled Aug. 12, 1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

GRECO CANNING CO., a Corporation,
Plaintiff in Error,

vs.

P. PASTENE & CO., INCORPORATED, a Corporation,
Defendant in Error.

Order Extending Time to and Including August 26, 1921, to File Record and Docket Cause.

GOOD CAUSE BEING SHOWN, it is hereby ORDERED that the plaintiff in error may have to and including August 26, 1921, within which to file the record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 26, 1921.

FRANK H. RUDKIN,
U. S. Circuit Judge.

[Endorsed]: No. 3750. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Aug. 26, 1921, to File Record and Docket Cause. Filed Jul. 26, 1921. F. D. Monckton, Clerk. Refiled Aug. 12, 1921. F. D. Monckton, Clerk.

No. 3750

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GRECO CANNING COMPANY
(a corporation),
Plaintiff in Error,

vs.

P. PASTENE & COMPANY, Incorporated
(a corporation),
Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

JOHN L. MCNAB,
C. C. COOLIDGE,
BYRON COLEMAN,
THEODORE A. BELL,
Attorney for Plaintiff in Error.

No. 3750

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GRECO CANNING COMPANY
(a corporation),
Plaintiff in Error,

vs.

P. PASTENE & COMPANY, Incorporated
(a corporation),
Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

The present action was commenced to recover damages for the breach of a contract to manufacture and deliver 3,000 cases of Salsa De Pomidoro or "Italian Tomato Paste" of the 1916 pack. The defendant delivered, under the contract, 665 cases, or approximately 22 per cent. of the quantity contracted for to the plaintiff in the court below. The defendant in error here proceeded upon the theory that it was entitled to recover upon a basis of a full and complete delivery of the quantity contracted for.

The contract entered into between the parties is set out as Exhibit "A" to the complaint (see Tr. p. 4), and provided as follows:

> "The GRECO CANNING Co., of San Jose, California, hereinafter called seller, this day sold, and P. Pastene & Co., New York City, N. Y., hereinafter called buyer, this day bought the following described goods—1916 pack:
>
> (2000) Two thousand cases Salsa De Pomidoro packed 200 tins to the case, six oz. each, in wooden cases at Three Dollars and Fifty cents ($3.50) per hundred tins.
>
> (2000) Two thousand cases Salsa De Pomidoro packed 200 tins to the case, six oz. each, in fiber cases at Three Dollars and Fifty cents ($3.50) per hundred tins.
>
> TERMS: The above-named goods are f.o.b. cars San Francisco, less 1½% cash discount, Sight Draft Bill of Lading attached.
>
> GUARANTEE: Buyers guarantee full acceptance unless this contract is otherwise changed by mutual consent of both seller and buyer. Seller guarantees that the goods covered by this contract are not adulterated, mislabeled, or misbranded within the meaning of the National Food and Drug Act, June 30, 1906: or the California Pure Food Act, March 11, 1907. Seller is relieved from any responsibility for misbranding when goods are not shipped under sellers' label. Quality to be of same consistency as the Imported, of good flavor and color. Samples for approval to be submitted prior to shipping and shipment to correspond with samples.
>
> CONDITIONS: Goods at risk of buyer from and after shipment, although shipped to seller's order. In case of short pack, seller agrees to make prorate delivery only. If seller should be unable to perform all its obligations under

this contract by reason of a strike, fire, or other circumstances, beyond its control, such obligations shall at once terminate and (4) cease. Usual swell guarantee—viz.—Seller guarantees swells not to exceed ½ to 1%.

Shipment to be made as soon as practical after packing. All goods remaining unshipped to be billed and paid for not later than November 1, 1916. Buyer agrees to protect draft against documents for invoice value on presentation. Seller agrees to store said goods and insure them at buyer's expense, should buyer so desire, until December 1, 1916.

Seller: Greco Canning Co.
By V. V. Greco,
Sec. and Tres.

Buyer: P. Pastene & Co.
By Chas. A. Pastene,
Pres.

Sweet Basil or Basilico.

One leaf of fresh Basil to be put in each tin, either on top or bottom of contents."

The plaintiff in error contends that it pro-rated delivery under the following provision of the contract:

"In case of short pack, seller agrees to make prorate delivery only. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire, or other circumstances, beyond its control, such obligations shall at once terminate and cease."

In suport of this the plaintiff in error, introduced evidence in the court below showing that there was a short pack caused partly by reason of a failure in the tomato crop due to weather conditions, and

partly to trouble caused by breakdowns in its machinery.

There is no dispute that if this defense is good the defendant in error received a full pro rate proportion of the pack to which it would have been entitled.

The trial court rendered its decision in favor of the defendant in error upon two grounds: (1) that there was a crop shortage of the 1919 crop, of not to exceed 20 per cent of normal; and, (2), that the breakdowns in the machinery of the plaintiff in error cannot be considered in determining whether there was a short pack, and did not come within the meaning of the words "other circumstances beyond its control." It is our contention that the words "short pack" are more embracing than merely "short crop," but that even if they were not broader in scope the evidence conclusively shows that there was sufficient crop shortage to justify no judgment in excess of $975.00. Second, that the evidence also shows that the contract construed in the light of the surrounding circumstances and the actions of the parties thereto was intended to excuse the plaintiff in error from full delivery if the impossibility of performance was due to breakdowns in machinery.

Specification of the Errors Relied On.

The tenth specification of errors (See Tr. p. 227) embraces all of the matters required for a discussion

of the two points hereinabove referred to. This specification is as follows:

"That the said District Court erred in making its decision and findings in the nature of a decision filed by the Honorable W. C. Van Fleet, District Judge in the above-entitled action in the following particulars:

(a) The court erred in failing to sustain the defense that there was a failure of crops and that such failure of crops was sufficient to justify the defendant in delivering only a short pack under the terms of its contract.

(b) The court erred in finding against the defendant's contention that the early rains and frosts damaged the crops to such an extent as to make it impossible to deliver other than a short pack to the plaintiff.

(c) The court erred in holding and finding that the burden was upon the defendant under its contract to secure tomatoes grown in other sections than the Santa Clara Valley and requiring the defendant to purchase tomatoes regardless of location.

(d) The court erred in finding and holding that the burden was upon defendant to show that fruit for the purposes of fulfilling the contract could not have been secured in other parts of the State than the particular locality in which the cannery of the defendant was located.

(e) The court erred in fact and in law in holding and finding that the evidence failed to disclose an effort on the part of the defendant to secure canning tomatoes in sections other than the Santa Clara Valley.

(f) The court erred in holding and finding that the defendant was justified in abating his

contract only to the extent of 20% from a full delivery.

(g) The court erred in holding and finding that the phrase 'circumstances beyond its control' did not include circumstances preventing the defendant from fulfilling his contract in terms.

(h) The court erred in finding that there was no custom making a failure under the circumstances asserted by the defendant and shown by the evidence to be within a custom of the trade recognizing the right to deliver a short pack.

(i) The court erred in holding and finding that nothing is regarded by the trade as justifying a short pack other than causes beyond the control of the packer such as those stipulated in the contract or of a kindred character.

(j) The court erred in holding and finding that the evidence did not sustain the contention that the parties in their dealings have given the contract the construction contended for by defendant.

(k) The court erred in holding and finding that the Plaintiff in his correspondence had not waived objections to the delivery of a short pack and had recognized the impossibilities of the defendant delivering in full under the contract.

(l) The court erred in holding and finding that it was impossible for the defendant to have procured canning fruit in other localities than those adjacent to the cannery in view of the uncontradicted evidence that fruit for the peculiar product must be secured in the immediate vicinity and be immediately manufactured when picked.

(m) The court erred in holding and finding that the plaintiff in its correspondence, in which it stated, 'If you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you,' did not have a reference to the conditions relating to machinery and did not intend by such correspondence to waive the delivery of a short pack.

(n) The court erred in holding and finding that the defendant did not deliver the full pro rata to the plaintiff to which plaintiff was entitled.

(o) The court erred in holding and finding that the plaintiff's correspondence and letters acknowledging letters from the defendant did not constitute an acquiescence in the delivery of a short pack by the defendant and the necessity therefor.

(p) The court erred in holding and finding that the plaintiff was entitled to a judgment based upon a delivery of 80% of the quantity contracted for, less the quantity already delivered, and for its costs."

Argument.

I.

THE COURT ERRED IN FINDING THAT THE DEFENDANT IN ERROR WAS ENTITLED TO AN 80% DELIVERY.

In the opinion filed by Judge Van Fleet and cited at page 212 of the Transcript, the court states that the evidence was indefinite as to the effect of

the rains and frosts in other counties than Santa Clara, which was the county in which the cannery of the plaintiff in error was located. And the court goes on to say that there is nothing in the terms of the contract requiring that the goods contracted for be produced from tomatoes grown in any particular section, and that therefore it was incumbent upon the plaintiff in error to show that the fruit could not be grown in other parts of the state in quantity to fulfill the contract. In support of this statement the court cites the case of

> *Newall v. New Holstein Canning Co.,* 119 Wis. 635; 97 N. W. 487.

We respectfully call this court's attention to the following language in that case:

> "For aught that the evidence discloses, appellant might have secured all of the tomatoes needed in the market *within a reasonable distance from the factory,* making it feasible and practicable to buy the fruit and transport it to the cannery for the purpose of this undertaking."

In the case at bar the evidence is uncontradicted that it was neither feasible nor practicable to buy fruit for the purpose of making this particular product anywhere except within the immediate vicinity of the cannery, nor was it possible to purchase it in the immediate vicinity after the failure of the crop, for the reason that the entire crop in that vicinity is always completely contracted for at the commencement of the season, and there is nothing available in the event of a crop failure.

Mr. H. T. Rigg, a witness for the defendant in error, testified as follows (Tr. p. 146):

> "In the other part of the plant they could use a different quality of tomatoes. They could use tomatoes a little greener than they could in the vacuum, and for the making of Salsa De Pomidoro *it should be a perfectly ripe tomato. They are sorted stock, sorted tomatoes.* Those that were of the commoner or inferior quality would be sent over to the other side and put into the general product."

Victor V. V. Greco also testifying on behalf of the plaintiff in error said (Tr. p. 38):

> "It was our custom to buy *in the immediate vicinity, so as to get best results, get better quality of raw material, and get it to our canning plant fresh,* so our contracts were mostly entered into in the Santa Clara County Valley. We never aimed to buy outside at any great distance. In doing that we were following the usual custom of our plant."

And further (Tr. p. 40):

> "After this rain occurred it was followed by a heavy frost. As a result of that rain and frost we could not secure tomatoes to continue the running of our plant, and *it could never be done, because we cannot buy tomatoes in the open market; there are none to be had.* The tomatoes are usually contracted for by the canneries. We figure out our tonnage of requirements, and we base our acreage on the yield per ton and contract accordingly. When we buy tomatoes, we do not buy by tons, but *we contract for acreage* of different patches, maybe ten, twenty or thirty patches; one patch will have five acres, another 20 or 30 or 40. We

contract to take all their tomatoes, provided they are ripe and in good condition. After this rain and frost occurred, it would absolutely not have been possible within my knowledge, to have secured tomatoes *in any other locality, either in California or elsewhere.*"

And further (Tr. p. 92) the witness was asked:

"Q. And now, Mr. Greco, let me ask you, what quality of tomato—no, I withdraw that—is there any special quality of tomato that is required in order to make the Salsa de Pomidoro?

"A. No special quality of tomato, except that *tomato must be at its best when it is good, mature.* In other words, a very early tomato, ordinarily the farmer will pick it before it is completely matured so as to begin shipping, and later on in the season, when the sunshine is not sufficient, why you do not then get the same color again and it is not adapted for that particular purpose because *you require a very highly matured and red tomato to make a good product.*

"Q. And in order to make this product was it, or was it not, your effort to secure the tomatoes *in exactly the prime condition for that purpose?*

A. *Yes, sir.*

Q. And after the rain and the frost had fallen on these tomatoes, *were they in a condition to make this product?* A. *No, sir, they were not.*"

This testimony stands in the record uncontradicted; it completely refutes the statement of the court below to the effect that it was incumbent upon the plaintiff in error to show that the fruit could not have been secured in other parts of the State in

quantity to fulfill the contract. There was no fruit in other parts of the State to be purchased; nor would it have availed the plaintiff in error had it been purchasable because it was essential to the proper manufacture of this product that only prime ripe tomatoes be used, and for that reason only the choicest of the product grown in the immediate vicinity would be available for this purpose. We must bear in mind that the contract excuses full delivery in case of "short pack." Assuming, for the sake of argument, that "short pack" means nothing more than "short crop," we find, from the evidence, that the plaintiff in error contracted for between 500 to 550 acres of tomatoes during the 1916 season (Tr. p. 183).

The witness Greco being recalled, testified as follows (Tr. p. 183 and 184):

> "Since I was on the witness-stand I have made investigation and computation to ascertain as closely as I could the acreage which we had under contract for delivery to us in Santa Clara in 1916. The acreage was between 500 and 550 acres. The number of tons of tomatoes delivered to our cannery during the season of 1916 was a little over 2,000. I can estimate the amount of tonnage which there was in the acreage which we had contracted for delivery to us. We should have had not less than 5,500 tons delivered from that acreage, and there were delivered to us from that acreage a little over 2,000. The failure of the delivery of the remaining 3,000 odd tons was not due to any action on our part."

This testimony shows that there was a failure of 3500/5500 of the crop upon the acreage contracted for by the plaintiff in error in the immediate vicinity of his cannery, where it was necessary that the tomatoes for use in the manufacture of this product be grown. Reducing these fractions to decimals it shows that the defendant obtained about 36.36% of the crop it expected to get.

Mr. Greco testified (Tr. p. 122): That he contracted to sell 18,930 cases of Salsa alone, and he figured that it would take about 2800 tons of tomatoes to pack that number of cases of Salsa. As the plaintiff in error only received a little more than 2000 tons of tomatoes altogether it will be readily seen that it was impossible to make a full delivery, even of the Salsa De Pomidoro, and, of course, if he had contracts for the sale of other products as well, the pro rata proportion would be very small.

Assuming, therefore, that short pack means short crop only, the plaintiff under the uncontradicted evidence in this case is only entitled to 36.36% delivery upon its contract. The contract having been for 3000 cases, this would entitle the plaintiff to 1090 cases. The plaintiff had already received 665 cases, which would leave approximately 325 cases to which it would still be entitled under its own theory of the case. The damage suffered by the plaintiff is the difference between the contract price, namely, $7.00 per case, and the market price, which was stipulated to have been $10.00 per case, or $3.00.

This would fix the total damages of the plaintiff at the sum of $975.

II.

THE TRIAL COURT ERRED IN HOLDING THAT THE TERM "SHORT PACK" WAS LIMITED ONLY TO "SHORT CROP" AND THAT THE PARTIES TO THE CONTRACT DID NOT BY THEIR ACTIONS UNDER IT AND PRACTICAL INTERPRETATION THEREOF CONSTRUE THE BREAKDOWN OF THE MACHINERY AS AN EXCUSE FOR FULL DELIVERY.

The parties to this contract stipulated that performance would be excused in case of "short pack." They further stipulated that the obligations of the seller should terminate and cease if it should be unable to perform its obligation by reason of a strike, fire, or other circumstances beyond its control.

The parties were not contracting for the delivery of so many goods of a particular kind, but with reference to a specific article which was to be manufactured expressly for the defendant in error, and in which contract the defendant in error even went so far as to require *samples for approval* and a direction for a leaf of fresh Basil to be put at the top or bottom of every tin.

Even at common law and without such stipulations in the contract as those contained here, where the contract relates to dealings with specific things in which the performance depends upon the existence of a particular thing, in the event of the destruction

of the thing without default in the party contracting performance is excused, because from the very nature of the contract it is apparent that the parties contracted on a basis of the existence or production of the subject of the contract.

In the leading case of—

Howell v. Coupland, L. R. 1 Q. B. Div. 258,

the defendant agreed to sell to the plaintiff 200 tons of potatoes grown on land belonging to him, the potatoes to be paid for when they were taken away. There was a crop failure caused by a disease of the plant and it was held that the defendant was exonerated from performing, the court saying (p. 299):

> "This is not like the case of a contract to deliver so many goods of a particular kind, where no specific goods are to be sold. Here there was an agreement to sell and buy two hundred tons out of a crop to be grown on specific land, so that it is an agreement to sell what will be and may be called specific things; therefore neither party is liable if the performance becomes impossible. The language of this contract is much easier to imply a condition from than in most former cases where it has been held to be implied."

In *Mineral Park Land Co. v. Howard,* 172; Cal. 289,

the Supreme Court of this state said (pp. 292 and 293):

> "It is, however, equally well settled that where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, perform-

ance is excused to the extent that the thing ceases to exist or turns out to be nonexistent. (1 Beach on Contracts, sec. 217; 9 Cyc. 631.)"

* * * * * *

"The parties were contracting for the right to take earth and gravel to be used in the construction of the bridge. When they stipulated that all of the earth and gravel needed for this purpose should be taken from plaintiff's land, they contemplated and assumed that the land contained the requisite quantity, available for use. The defendants were not binding themselves to take what was not there. And, in determining whether the earth and gravel were 'available,' we must view the conditions in a practical and reasonable way. Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents then, it was impossible for defendants to take it. 'A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.' (1 Beach on Contracts, sec. 216.) We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expense than they had anticipated, or which would entail a loss upon them. But where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel."

In the case at bar the parties were contracting for a specific article to be manufactured specially for the defendant in error, and it is submitted that having made every effort in good faith to perform, and

having failed through no fault of his own, not within the contemplation of the parties, plaintiff in error is excused from further performance. Not only does the contract upon its face show that the words "short pack" are broader in significance than "short crop", but the parties themselves acted upon and placed a particular construction upon the language of the contract showing clearly that they intended and believed the term "short pack" to include and excuse short delivery by reason of the circumstances which appeared in the evidence of this case.

The parties to a contract have the right to put their own construction upon it and to regulate their rights and liabilities thereunder, and where parties to a contract have so construed and interpreted it, the courts generally adopt that construction in arriving at the meaning of the contract.

Guaranty Trust Co. of N. Y. v. Koehler, 195 Fed. 669;
Nelson v. Ohio Cultivator Co., 188 Fed. 620;
Carter v. Hengst, 246 Fed. 674;
In re Thomas, 231 Fed. 513;
Keith v. Elec. Engineering Co., 136 Cal. 178;
District of Columbia v. Gallaher, 124 U. S. 505, 31 L. Ed. 526.

In *Attorney General v. Drummond,* 1 Dr. & War 368, Sugden, Chancellor, said: "Tell me what you have done under a deed, and I will tell you what that deed means."

It is our contention that an analysis of what the parties to this agreement have done under the agreement will show that it was their intention to relieve the defendant from the failure to make full delivery by reason of the circumstances that prevented it from entirely performing the contract. The contract was not a mere contract for the sale of an ordinary commodity upon the market, but was a contract for the sale of a new product never before manufactured in the United States and which required special machinery for its manufacture and which was known to require such special machinery by both parties, and was for the product of the defendant's own cannery and for no other product.

The contract attached as an exhibit to the complaint was for the sale of the 1916 pack of Salsa De Pomidoro, that is, of that product which was to be packed from the 1916 crop of tomatoes. The contract contains a clause, "Shipment to be made as soon as practicable *after packing.*" It also provides for the submission of samples for approval prior to shipping and shipment to correspond with samples. That the pack of the defendant's cannery, and of defendant's cannery only, was intended by these provisions is further shown by a letter of May 8th addressed to the Greco Canning Co., by P. Pastene & Co., and which in effect is a modification and commentary upon the contract itself (See Tr. p. 78). Quoting from that letter:

> "You will notice that we have inserted in a couple of places additional words to clear the

> meaning of what we had no doubt was exactly your intent in said contract but we thought that possibly it would be best for all concerned to have the matter clearly stipulated.
>
> The first is in reference to approval of sample. Naturally, in view of the fact *that you have never made any of this article and therefore we have no means of knowing what you will put up,* it is essential that we have an opportunity to pass judgment on the type of article *you will manufacture* by having sample tins sent for approval or rejection."

If, therefore, it became impossible for the defendant to manufacture this article, the contract of the parties, by their own construction and interpretation, excuses the defendant from a failure to make full delivery. In this connection the case differs from that of *Carnegie Steel Co. v. United States,* 240 U. S. 156, cited by the trial court. In that case it appeared that the difficulties encountered were unforeseen by both parties when the contract was made, and that, therefore, the parties contracted without reference to these unforeseen or unforeseeable difficulties. In the case at bar, the difficulties were foreseen and the clause containing the provisions with regard to "short pack" was intended by the parties to cover a situation such as here existed. In the *Carnegie Steel Co.* case neither party at the time it signed the agreement knew that the process hitherto used would not produce the article to be delivered. In the Pastene case, both parties did know that new machinery would be required and that the industry was in its infancy in the United

States, and they contracted with reference to that fact.

Mr. Pastene says in his deposition (Tr. p. 158):

> "It was an article which, prior to the war, to my knowledge had never been manufactured in this country. As a result of the abnormal conditions, the exportation from Italy was curtailed, embargoes were placed from time to time until ultimately the exportation was entirely prohibited. As a result of this, domestic canners of tomatoes principally interest themselves in imitating the article, or manufacturing it here from the American tomato. However, this necessitated, of course, the installation of new machinery, new arrangements, so that *it was not possible to produce in quantities* to take care of the entire demand and consumption of the people who were accustomed to using this product."

But in addition to these distinctions, we find that the correspondence between the parties throws considerable further light upon their construction of the agreement. The plaintiff in error prepared from its books the tabulation found on page 32 of the Transcript (defendant's exhibit "A"), showing the names of every person with whom it had a contract for the sale of Salsa, the number of cases contracted for, the quantity delivered, the per centage of delivery and the price. That table shows that the pro rata proportion to which each customer was entitled was 18.2% of the amount contracted for; that the plaintiff in this action received 22.2% of the amount contracted for, which was more than its pro rata proportion, based upon this tabulation,

and was the highest proportion delivered, except in three instances, in which 50% was delivered, but all three of those cases were for very small deliveries and were made early in the season before the defendant realized the shortage that was about to occur. Counsel believed at that time, and still believes, that this tabulation shows that the plaintiff has received more than its pro rata share of defendant's 1916 pack of Salsa, and that this pack was short because of circumstances which the parties understood would relieve the defendant from further obligations. The defendant made the greatest profit out of its Salsa De Pomidoro and ran its plant to its fullest capacity. It was, of course, to the advantage of the defendant to produce all the Salsa De Pomidoro that it could.

On October 12, 1916, at the very beginning of the pack, the plaintiff was notified by the defendant that it did not look as if it would be possible to supply more than a 25% delivery, on account of the condition of the machinery. Quoting from that letter (See Tr. p. 42):

> "Your communications of recent dates were received. We have failed answering you sooner for several reasons. The writer has been very busy with factory operations, particularly with the new line for the salsini, which has proven a failure as to getting out the quantity that we expected, due to the fact that the tube system in our vacuum pans is wrong. We can only operate this for a short period and it takes from five to six times the time for cleaning out.

The tomato pulp contains quite a percentage of albumen and this causes the material in the tube to burn. We are now operating on about a 25% efficiency and been compelled to reduce the concentration so as to enable us to get some out.

We are now pretty late in the season and from all indications it appears that not over a 25% delivery can be made, of which we are extremely sorry, as we intended to make full delivery, notwithstanding that our contract provides for pro rate delivery."

In the reply to this letter it will be seen that the plaintiff makes no contention that the defects in the machinery were not a valid excuse for a short delivery. It says (Tr. p. 45):

"We regret exceedingly to learn of the serious difficulty you are experiencing with machinery, *owing to the fact that the tube system in your vacuum pans is wrong.* Certainly your advice that you cannot now estimate on making more than a 25% delivery is a severe disappointment. We certainly trust you will find that you have been over-conservative in making this estimate and that it will be possible for you to make considerably larger delivery than this statement would now indicate.

At this time we will only state that if you make every possible effort to produce these goods within your power, *as we doubt not you are doing,* we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you. It is obvious, naturally, of course, that in any case we shall expect a full *pro rata* delivery of all such goods as you are successful in producing."

On November 2, the defendant again notified the plaintiff of its inability to make full delivery and

informed it that it was doubtful whether more than a 20% delivery could be made, for the reasons set forth in the previous letter (See Tr. p. 47). In answer to this letter, P. Pastene & Co. wrote on November 7, 1916, which letter contained the following language (Tr. p. 48):

> "Pro-rata: We understand that weather conditions have greatly improved during the last ten days in your country and that a long packing season is anticipated. We surely trust that these predictions may not miscarry as in that case we are confident that you will find it possible to considerably increase the production which you previously estimated as possible. As previously written you, we certainly have no intention of being unreasonable or expecting from you that which it is physically impossible for you to accomplish, but *we do expect, of course, that you will spare no efforts to, as nearly as possible, fill your contracts,* and it is for this reason that knowing that conditions have materially improved since you previously wrote us on this subject, we look forward to a better delivery than previously predicted. *Knowing that you will not spare any reasonable efforts to attain the desired result,* we look forward in anticipation to your more favorable news as mentioned.
>
> Yours respectfully,
> P. Pastene & Co., Inc.,
> P. R. Pastene."

The gravamen of the plaintiff's contention is to be found in the underscored portions of the letter just quoted from, which contention was never departed from until the commencement of the trial. The defendant never at any time spared any efforts

to fill the contracts, and worked day and night to make the deliveries as large as possible.

On November 13, 1916, the defendant wrote to the plaintiff that it was finishing the packing of the Salsa De Pomidoro in order to make further delivery to its other customers, and that the plaintiff could expect no further delivery from it. (Tr. p. 50):

> "We are obliged to discontinue canning tomatoes, and are now running our line on the Salsa, expecting to finish the season on this so as to enable us to make good our 20% to our other firms who have not had 20%, and some none at all. We are doing this at a great loss to us, as you know the tomato market on 2½ cans has advanced about $1.00 per case."

In reply to this we have a telegram of December 19, 1916, from the plaintiff to the defendant. This telegram, marked Defendant's Exhibit "G" (Tr. p. 51), is as follows:

> "New York, Dec. 19, 1916.
> Grego Canning Co., San Jose.
> Salsa just arrived billed as tomato sauce instead of canned vegetables Southern Pacific demanding ninety cent rate. Kindly arrange agents there correct rate to forty. Further sauce very liquid not similar quality shipments made others sauce which considerably more concentrated. We protest the quality and *protect percent delivery* as against fifty sixty per cent made to others our contract one of the first made. Await your remarks.
> P. Pastene Co., Inc."

It will be noted that only per cent delivery is demanded. This telegram was followed by a letter of

the same date from the plaintiff to the defendant, from which we quote the following paragraph (Tr. p. 52):

> "*Pro rata delivery*: You give us a 23% delivery on our contract and we have since learned that other concerns have received considerably more. Two concerns who we know of in the South advised that they have received 50% delivery from you. Right is right, and we demand a fair, honorable deal, and we now ask you to please be good enough to tell us what you intend to do in the matter."

It will be seen from a perusal of this letter that the plaintiff's dissatisfaction appears to be caused by the information that others have received a 50% delivery while it had only received a 23% delivery. There is no contention that it is entitled to any more than a pro rata delivery.

On December 26, 1916, the defendant wrote a letter to the plaintiff (Tr. p. 56) explaining the reason for the variation in deliveries to the various customers:

> "In regards to your complaint as to short delivery, we assure you that you got a larger delivery than many others, some did not succeed in getting but 15½%. In the beginning of the season we thought that we would succeed in packing about a 50% delivery, but we regret to advise that we did not succeed in doing so. Your shipment being earlier than some of the others, constituted a larger delivery, while the very last that we shipped out, all that we could deliver, was a 15½%, as mentioned above."

The last letter between the parties prior to the commencement of the suit is dated January 10, (Tr. p. 57). We quote at length from this letter:

> "*Percentage of delivery:* We have no doubt that your statements are true in so far as they go. You tell of having delivered as low as 15½% but *you do not state the highest per cent against delivery.* We can only repeat that which we have already advised you—of information received from other sources of as high as 60% delivery and we certainly do not see why we should be elated at having received about 20% as against 15½% of some others.
>
> Lastly we note what you state about perfecting the machinery and your belief that during next season you can pack an article of good consistency—whatever that may mean, and that you desire to make up the deficiency or short delivery of this year by offering to protect the quantity you fell short on a basis $10.00 per case. Inasmuch as you are offering thru your New York brokers, Messrs. Seggerman Bros. & McNeill,—so we understand, for kindly note we do not make this as a positive assertion—on a basis of $11.00 per case f.o.b. terminal California with a 40% allowance for freight, we do not see where you are making us such a 'great' proposition.
>
> Honestly we are thoroughly disappointed! We cannot feel that you have treated us justly in this present season. Our information was that you *should have been able to deliver us 60%.* We have further information that you have sold pulp to various concerns—*We appreciate that possibly that was due to machinery trouble.*
>
> In conclusion, we can but state that we feel we are entitled to a *further* delivery on the 1916 pack and expect you will do so, and shipping a better quality than the one shipment made."

Even in this final correspondence between the parties there is no contention that a full delivery is demanded, but only that a further delivery should be made because of advices that others had received as high as 60%. This erroneous idea is fully dissipated by the tabulation marked Defendant's Exhibit "A" and found on page 32 of the Transcript.

The issue, therefore, between the parties, in our opinion, is not whether or not there was a crop failure, or whether or not the defendant could have gone out into the open market and obtained the product which it agreed to sell to the plaintiff, but whether the plaintiff has received its pro rata proportion of that product which was actually manufactured by the defendant from the 1916 tomato crop. The contract, viewed in the light of the correspondence and of the construction placed upon it by the parties, in our opinion is a contract for the sale of 3000 cases of Salsa De Promidoro, but the seller is to be excused from delivering any more than a pro rata proportion in the event it is unable, in the exercise of the highest good faith, to manufacture enough to supply all of its customers in full, whether that failure to manufacture is due to defects in machinery or otherwise; in fact, the defects in the machinery were within the contemplation of the parties, or otherwise the plaintiff would not have insisted in its letter of May 8, 1916 (Tr. p. 77) upon the sale being subject to approval of sample. The plaintiff knew and said that the defendant had never made any of this article before and had not

means of knowing the quality that the defendant would be likely to put up and, therefore, demanded samples for approval or rejection before it would be willing to accept the goods at all. The contract thereupon becomes not a consummated sale at all, but a sale subject to approval of sample. The plaintiff agrees to purchase 3000 cases, the output of the defendant's cannery, only in the event that its sample meets with the plaintiff's approval. This is not the ordinary canned-goods contract at all. It is a special contract entered into by the parties knowing the conditions of the trade and the fact that the article was not available in the United States at all, —that it was a new and dangerous venture; that it necessitated the installation of new machinery; and that, therefore, if the defendant should be unable to pack the specified quantity, a pro rated delivery only would be required, and if, whether by reason of defects in the machinery or ignorance of the methods of canning a high-class commodity, the article should fall short of what the plaintiff required for its trade, the plaintiff should have the right to reject the commodity manufactured by the defendant. It would have been impossible under this agreement and the interpretation placed upon it by the parties for the defendant to have gone into the open market and purchased this product, tendered it to the plaintiff, and thereby satisfied its obligations, because it expressly obligated itself to *specially manufacture* this article for defendant in error.

But there was no *absolute* promise upon the part of the Greco Canning Company to produce and sell to the defendant in error the amount of tomato sauce stated in the agreement. It was merely a pledge of good faith, and nothing more.

Kenan v. Yorkville Oil Co. (C. C. A., 4th Circuit), 360 Fed. 28.

The parties having in mind that the order was to be filled out of goods manufactured by the Greco Canning Company, there could be no actionable breach if the canning company, by reason of its inability to obtain tomatoes in the vicinity of the cannery, was unable to make full delivery.

Ontario etc. Assn. v. Cutting F. P. Co., 134 Cal. 21.

The distinction between a general undertaking to deliver a given amount of goods, and a sale of a specific lot of commodities (*Robinson v. MacLaine,* 167 Pac. 912) has some application here. When plaintiff in error sold this tomato sauce to the Pastene Company, the sauce was not in existence. The defendant in error knew that it had to be manufactured at the Greco cannery. If the defendant in error desired to impose upon the Greco cannery an *absolute* obligation to manufacture the full amount of tomato sauce mentioned in the agreement, it was its duty to require the canning company to insert such a covenant in the agreement. Having failed to do so, it has no right to import such a clause into the contract by implication (*Hudson Canal Co. v. Penn-*

sylvania Coal Co., 19 L. ed. 349). In other words the Greco Canning Co. merely represented that it intended to manufacture this brand of sauce at its cannery during the canning season of 1916. Out of whatever it might produce, it agreed to sell the Pastene Company the amount fixed in the agreement, and in the event sufficient tomato sauce was not produced during that season, to fill all orders taken by the canning company, then the amount produced was to be apportioned among the buyers.

The evidence shows that the defendant in error received its full pro rata of production. The canning company did not agree to do more than make a pro rate delivery of the amount packed by it during the season of 1916. Having done this, its contract was fully performed.

CONCLUSION.

The correspondence between the parties and surrounding circumstances indicate clearly that it was "quality" and not "quantity" which the defendant in error contracted for. It received "quality," not "quantity." The fact that it did not receive "quantity" was due to the very reason that it would have been possible only at a sacrifice of "quality," and this was exactly what the defendant in error did not want. A proper construction of the contract obtained from the contract as a whole and from the acts and interpretation of the parties thereunder, points ir-

resistibly to the conclusion that the clauses contained therein stipulating for excuses in case of "short pack" or failure to deliver were intended to apply to exactly the situation that occurred, and that the "short crop" coupled with the breakdown of the machinery of the plaintiff in error obviated the necessity of further performance by it under the terms of its agreement.

But even if this interpretation cannot be placed upon the contract, the judgment in favor of the plaintiff is grossly excessive and wholly unwarranted in view of the undisputed evidence in the record. This evidence conclusively shows that even if "short pack" be synonymous with "short crop", the defendant in error was only entitled to 36.36% of delivery, and having received 22.2% according to defendant's exhibit "A" (Tr. p. 32), the total amount to which it is entitled as damages under any interpretation of the contract is the sum of $975.00.

Dated, San Francisco,
October 8, 1921.

Respectfully submitted,

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BYRON COLEMAN,
THEODORE A. BELL,
Attorney for Plaintiff in Error.

No. 3750

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 9

GRECO CANNING COMPANY
(a corporation),

Plaintiff in Error,

vs.

P. PASTENE & COMPANY, Incorporated
(a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM THOMAS,
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JAMES LANAGAN,
THOMAS, BEEDY & LANAGAN,
Attorneys for Defendant in Error.

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BRIEF FOR DEFENDANT IN ERROR.

This is an action on a contract dated April 28, 1916, by which plaintiff in error agreed to sell and deliver f. o. b. cars San Francisco three thousand cases of Salsa de Pomidoro, packed two hundred tins to the case, for $3.50 per hundred tins, or $7.00 per case. It made delivery of only six hundred and sixty-five cases, leaving a balance undelivered of two thousand, three hundred and thirty-five cases.

It was stipulated that the market price of the goods at the time and place of delivery was $10.00 a case. It follows that the judgment against plain-

tiff in error is right, unless it was for some reason excused from performing the contract.

The contract contained the following provision:

> "In case of short pack seller agrees to make pro rate delivery only. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire, or other circumstances beyond its control, such obligations shall at once terminate and cease."

In its answer the Greco Company offers two reasons for nondelivery:

1st. That there was a short pack within the meaning of the contract; and

2nd. That it was prevented from delivery by a cause beyond its control, namely, the failure of the tomato crop in the year 1916.

SHORT PACK.

The Greco Company's contention seems to be that it had a short pack because of the failure of the tomato crop, and also because its paste-making machinery failed to work. We shall first consider the question as to whether or not there was a failure of the tomato crop in 1916. There is some conflict in the testimony, although the general effect of the evidence seemed to indicate that the damage done by the rains and frost was not very serious. The schedule introduced by the plaintiff, showing the average production of tomatoes in various parts of the state in the year 1916 gave the Santa Clara

Valley 9.09 tons to the acre. Mr. Milton M. Berne, a broker, who testified on behalf of the defendant, stated that 9.09 tons to the acre in Santa Clara Valley "would be a fair average production" (Transcript pages 134-5). The evidence given by the two tomato growers was anything but satisfactory. Mr. W. E. Greer cultivated six acres of tomatoes in 1916 (Transcript page 159). He got a little less than four tons to the acre (Transcript page 159). Yet he said, on cross-examination (Transcript page 162), that Mr. Withers, on the Almaden Road, one of his neighbors, delivered to the California Packing Corporation seven tons to the acre. Perhaps the reason why Mr. Greer only got three and one-half to four tons may be found in Mr. Greco's testimony (Transcript page 40). In answer to a question as to the effect of rain on the tomato crop, he said:

> "You would not get two fields that were alike, Mr. McNab, because one field, if properly taken care of, regardless of rain and weather conditions, will produce maybe twenty-five tons of tomatoes to an acre; another field in the same valley, and handled by some other man, not properly cultivated, will produce maybe only three tons to the acre."

Mr. J. L. Mosher got only one hundred tons from his twenty acres. He was not under contract to deliver his tomatoes to anybody, and one reason why he got such a small yield may be found in his testimony on cross-examination (Transcript page 165).

"Q. Did you have all the help you needed with your tomatoes?

"A. I don't think we did. I think we were a little short of help. A little short, but not so as to be crippled at all."

Mr. H. Rigg, who ran the paste line of machinery for the Greco Company, on direct examination testified as follows (Transcript page 137):

"There was no time that we did not stop altogether. There were times when we ran along short on account of green tomatoes coming in and we could not use them for making sauce. I think that occurred twice. That was right after the rain began. The rains began the 2d of November. There was rain the latter part of the month of October once in a while. There would be a little shower, but it did not amount to much. The serious rains commenced the 2nd of November. There did not any green tomatoes come in but stopped us from packing for about 3 days because we could not get into the fields to haul them out. On November 18th we did not run very much through the vacuum pans on account of green tomatoes. I see no instance before that. That is all I see here."

Again, on page 145, we find the following:

"Very frequently during the season of 1916, when I was in the (123-90) employ of the Greco Canning Company, I had an opportunity of observing the tomatoes that I was putting through this paste machine. There was no time that I can recall when there was a shortage of tomatoes, outside the latter part of the season, in November, those three days that I testified to, and the latter part of the season. We were slowed up at least on two days on account of green tomatoes coming in, and that

> was due to the fact that it took a long time to sort them, because there were so many green ones. With the exception of that we had plenty of tomatoes."

On cross-examination (Transcript page 147) Mr. Rigg said:

> "During November we did not shut down because we did not have the tomatoes. We shut down the night shift because the night man could not seem to make a success of running it."

Mr. Leal Davis, consulting engineer of the Greco Canning Company, called as a witness for the defendant, said, on cross-examination:

> "I was there every day and saw this part of the plant in operation. I do not think I ever saw the paste line shut down for lack of tomatoes."

Mr. Charles H. Bentley, General Sales Manager of the California Packing Corporation, testified (Transcript page 199): That in the year 1916 the California Packing Corporation made full delivery on its sales of tomatoes and tomato products in 1916 from the pack of its Santa Clara plant known as the Central California Canneries, and a one hundred per cent. delivery on all its other plants. Answering a question by the court, he said (Transcript page 203):

> "As to the failure of the crop in 1916, through weather conditions, it was not serious. I said from 15 to 20%."

In view of all the evidence on this point, it seems to us that Mr. Bentley was probably right, and that

in the year 1916 there was not really a shortage of tomatoes, serious enough to excuse the Greco Company from making a full delivery against his sales of Salsa De Pomidoro. Judge Van Fleet allowed an abatement of 20%.

In addition to a failure to sustain the burden of proof of crop failure, the Greco Company did not make the necessary effort to get tomatoes elsewhere. Mr. Greco testified (Transcript page 110) that he found out that his acreage was insufficient, due to rain and frost, right at the beginning—say some time in October. He sent a buyer to Manteca and he himself went to San Francisco (Transcript pages 110 and 111). He also tried to get tomatoes in the Santa Clara Valley. On page 117 of the Transcript we find the following testimony on cross-examination:

> "Besides Manteca and San Francisco I endeavored to get tomatoes in the season of 1916 in our immediate vicinity.
>
> "Q. In your immediate vicinity. Anywhere else? A. No, sir."

Although the matter is so well known that the court could take judicial notice of it, Mr. Berne, one of Greco's witnesses, testified (page 135): That tomatoes were grown in Alameda County, San Joaquin County, Sacramento County, many of the southern counties around Los Angeles, and Sonoma County. Now, there was nothing in the contract which provided that the Salsa De Pomidoro was to be made from tomatoes produced at any particular

place, and under the circumstances it was the Greco Company's duty to use every reasonable effort to get the tomatoes in any available market.

This precise question came before the Supreme Court of Wisconsin, in the case of

Newell et al. v. New Holstein Canning Co.,
97 N. W. 487.

There the defendant sold to plaintiff certain cases of canned tomatoes and the contract provided that if by the destruction of the defendant's cannery by fire, or on account of strikes, "or from any other cause over which" he had no control, he was prevented from performing the contract, he should not be liable for any damages for such failure. His tomato crop was destroyed by frost. He thereupon made efforts at two markets,—one eleven miles and the other forty-six miles from his cannery,—to procure tomatoes, but failed. The court held him liable, and the case is so precisely on all fours with our case that we quote at length from the decision. The court said, at page 488:

> "One of the defenses to excuse delivery of the tomatoes specified in the contract was that appellant was prevented from performance owing to unusual frosts in the month of September, whereby their fruit and the crop in the immediate vicinity and the eastern part of the state was destroyed; and on that account it had raised no tomatoes, nor could it procure any in the vicinity of the factory to comply with this undertaking. Does this present a state of facts which relieves the company from performance of the contract? It is claimed the provision

that 'if by the destruction of the cannery by fire, or if on account of strikes, or from any other cause over which the seller has no control, he is prevented from performing this contact, he shall not be liable for any damages for such failure', covers and includes the destruction of the tomato crop by frost, as shown by the evidence, and excuses appellant from full performance of the agreement. There is no allusion in the contract to any particular source from which these tomatoes were to be taken except that they should be of the 1901 pack of appellant's cannery. Reading the material provision in the light of the facts and circumstances under which it was made, it seems a reasonable and natural conclusion that the parties did not intend that appellant was undertaking to sell and deliver tomatoes to be grown upon a particular field, or in the immediate neighborhood of the cannery. Had the sale been to deliver a crop grown on appellant's field, or in the neighborhood of the cannery, then the destruction by frost of the crop so specified might be held to be an excuse for the nonperformance of the undertaking, under the rule that the promise to deliver a specific article depended on the assumed existence of it at the time of performance, and that it was destroyed without his fault, rendering performance impossible. Appellant, however, was not restricted under the contract to such field or neighborhood to produce tomatoes to fill the contract. It had the right to go into the open market and purchase tomatoes of the kind and quality specified in the agreement, pack them at its cannery, and deliver them to respondent under the terms of the contract. It therefore was its duty to make all reasonable effort to secure the necessary fruit, and pack it at its cannery, to enable it to comply with its promise. The question arises, does the evidence tend to show that appellant

took the necessary steps to comply with this obligation? It is undisputed that the tomato crop on its field and in the immediate vicinity of the cannery was destroyed by frost on the 18th or 19th of September. It is testified that this frost extended over the eastern portion of the state. The material part of the evidence on this subject is the testimony of the secretary of the company. He states that the efforts made to secure tomatoes for packing at appellant's cannery were limited to two inquiries in the market—one at St. Nazianz, 11 miles from the cannery, and the other at Appleton, 46 miles from the factory. No other efforts were made to procure the fruit in other portions of adjoining territory or in the open market. For aught that the evidence discloses, appellant might have secured all the tomatoes needed in the market within a reasonable distance from the factory, making it feasible and practicable to buy the fruit and transport it to the cannery for the purpose of this undertaking. Under this state of facts and circumstances, no grounds were established constituting a legal excuse relieving appellant from performing its obligations under the agreement, and respondents had a right to insist on performance."

According to this decision, it was certainly the Greco Company's duty to make efforts in other places than Manteca and San Francisco. There is no showing in the record that it could not have gotten its tomatoes in Alameda County, or in the Sonoma or San Joaquin valleys, or perhaps from Los Angeles.

A very weak attempt is made on pages 8 and following of the opening brief to distinguish the case of *Newell et al. v. New Holstein Canning Co.,* 97

N. W. 487. Mr. Greco did testify that it was his custom to buy tomatoes in the immediate vicinity of his plant, but of course this custom could not bind Pastene & Co. Under the doctrine of the Newell case he was bound at least to try Alameda, San Joaquin, Sacramento and Sonoma counties. The doctrine of the Newell case fits this case precisely. When the defendant found out *right at the first of the season* that the crop in the Santa Clara Valley was going to be short, it was bound to make the attempt in good faith to find the tomatoes within a reasonable distance of the cannery.

In our opinion, however, there is a far more serious reason why the plaintiff in error in this case cannot rely upon a short crop as a reason for a short pack. Mr. Greco failed to produce data which would enable the court to determine what *the relation was between the acreage that he had contracted for and the amount of tomato products that he had sold against that acreage.* When he was asked how many cases of solid pack he contracted to sell from the 1916 pack, he answered: "I have no recollection" (Transcript page 116). After he had stated that he had the contracts, the court said:

> "Yes, produce those contracts, not only for that, but for your acreage, too."

Mr. Greco testified that he made a search for the contracts for delivery of tomatoes from the 1916 acreage, but that he could not find them, and thought they were destroyed (Transcript page 183). This

leaves us in a position of not being able to determine whether Mr. Greco had oversold his acreage or not. He testified that to the best of his recollection he had contracted for from 500 to 550 acres and that he expected to get 5,500 tons of tomatoes from that acreage. *But since we do not know whether he sold 5,500 tons or 1,000 tons, or 20,000 tons, we cannot tell whether any damage to the crop made any difference in his ability to deliver or not.* He has simply failed to produce evidence sufficient to sustain the burden of proof that damage to the tomato crop of 1916 prevented him from delivering one hundred per cent. of the tomatoes that he had contracted to sell. We think that this disposes of the whole question of short crop, *regardless of whether or not the crop was damaged.* In the absence of any evidence of what sales and deliveries he made, for instance of solid pack tomatoes, *for which product the same tomatoes were used as for Salsa de Pomidoro* (see Mr. Greco's testimony, Transcript page 93), the question as to whether the crop of 1916 was damaged by frost or rain really becomes immaterial. Mr. Greco said (Transcript page 119):

> "I do not remember what percentage of deliveries of solid pack we made in 1916. The book I referred to before will show the actual deliveries. I do not remember whether we were able to fulfill our contracts or not. To be frank, I do not remember whether they were 50% or 100%, and I do not remember about the tomato sauce, whether 100% for them or not."

He gave the court no basis of calculation.

A great deal of testimony was introduced to the effect that Mr. Greco had a great deal of trouble with the paste-making machinery—the so-called "paste line", and particularly with the vacuum apparatus. This brings us to the second branch of the short pack defense, and the question that we have to decide is, whether a failure of the machinery, under the circumstances of this case, would be an excuse for a short pack, and, therefore, a valid reason for making a pro rata delivery. It seems that this vacuum pan process was in use at Naples, Italy, but had not been used in this country. The Greco Company's letter of January 5, 1916 (Transcript pages 61-62), stated that it contemplated packing about 60,000 cases of Naples Tomato Sauce, which was, of course, the Salsa de Pomidoro, and went on to say:

> "As we are Italian, and know what the Italian people must have, *and being very familiar with the method of manufacturing this article,* you can rest assured that it will be the equal of that imported from Italy."

It seems that Mr. Greco read a report by the Department of Agriculture of the United States Government, that he studied it up, and that then he and George Krenz, a coppersmith, got their heads together and devised the vacuum pan apparatus (Transcript pages 105, 109 and 118). Krenz then installed it and sent a man to run it. After that, Rigg was put in charge of the vacuum pans and

operated them until November 28th. The trouble with the vacuum pans seemed to be more or less continuous, and the Greco Company finally learned, that is to say, experience taught them, that the tubes were too small (Transcript page 150). This was afterwards remedied and the next season the vacuum pans worked well.

The court will undoubtedly notice that there is no testimony even tending to show that any experiment was made with this machinery before the defendant began to sell its product.

A number of experts testified as to whether or not a failure of machinery would be included in the term "short pack". The defendant's witness Sussman testified as follows (Transcript page 180):

> "Q. Just describe to the court in a general way what that is intended to include, as you understand it in the trade?
>
> "A. The trade understands that the canner, in selling a certain amount of goods on a future-delivery contract, is selling that quantity of goods in good faith, and expects at the time to deliver the full quantity that he sells; it is thoroughly understood by the trade, however, that if he does everything in good faith that he can to make full delivery, *if he is prevented by circumstances beyond his control,* then the trade in general will absolve him from responsibility of delivery, as long as he has done everything that he can in good faith to deliver in full and has not deliberately over-sold himself.
>
> "Q. And within the term 'circumstances beyond his control', state what the trade would recognize as being beyond his control?
>
> "A. *Anything that he could not, in the ex-*

> *ercise of reasonable precaution, prevent;* for instance, if I might give an instance, if a canner should fail to make delivery because he has not sufficient cans, the trade would not excuse him if he did not order the cans, or if he did not order them within a reasonable time; for instance, as happened during this past season, canners were compelled to make pro rata deliveries on certain items because the American Can Company did not deliver certain sizes of cans to them on time. The American Can Company, as a matter of fact, could not itself deliver them on time because of the railroad strike, and that prevented them being put in the cans at a certain time. If the canner had not ordered those cans, I do not believe the trade would have absolved him from the responsibility of delivery; in fact, I know they would not. But if it was beyond his control to get delivery, that would be different."

The substance of Mr. Sussman's definition is, of course, that in order to excuse the packer, the cause must have been something beyond his control. Mr. Charles H. Bently made the matter a little more definite. He said (Transcript page 198):

> "This condition in the selling contract as generally used is the outcome of the *effort to divide the hazard of crops.* The custom is for the canner to contract with the growers early in the year, not for a specific number of tons, but for a given acreage, the canner assuming a large part of the risk of the out-turn, because he has certain overhead expenses to meet regardless of the crop yield; accordingly, he goes to the trade and sells for forward delivery, and bases his sales, usually, on a conservative estimate of the yield he may expect from the acreage he has under control; and in selling on a pro rate con-

tract for delivery, after packing he asks the wholesaler to assume with him a part of the crop hazards; the grower would have no liability in the case of the utter failure of the crop, and, on the other hand, in most cases the canner would have to take whatever would be produced on that acreage; accordingly, the trade has recognized the need and the fairness of the pro rate contract, based on what is known as the short pack.

"The COURT. Now, then, if I understand that, Mr. Bentley, the term 'short pack' relates to and covers an inability to make a pack sufficient to fulfil contracts in their entirety through failure of the crop, from one cause or another.

"A. Through failure of the crop, and the contracts, as a rule, then provide for protection against other hazards in the way of natural hazards.

"Q. The question simply covers now the meaning of that term 'short pack',—what that covers; the others are, as you say, covered by other terms, strikes, and fires, etc., I suppose.

"A. Strikes, fires, floods, natural causes beyond control. Natural causes for a pro rate delivery."

We think that these two witnesses have furnished the court the true rule. On cross-examination, Mr. Bentley stated (Transcript page 206):

"Q. Well, now, Mr. Bentley, assuming that you contracted for a sufficient number of cans, and the cannery failed to deliver to you the requisite number of cans, under the short pack clause, aren't you justified in making pro rate delivery?

"A. Under any conditions beyond our control * * * if the canner fails on account of a railroad strike his contract protects him just as ours protects us.

"Q. Let us eliminate the railroad strike. Your company contracts with the American Can Company to deliver five million No. 2 cans, yet it does not do it, and you use the utmost diligence and you can produce your product, and you have not any cans to put it in, won't the trade protect you on pro rate delivery?

"A. I question very much whether we would have any right to expect the trade to protect us, unless the shortage of cans arose from conditions such as I have named, that is, a strike; the can company would certainly protect us against failure to deliver under our contract in a case of that kind.

"The COURT. In other words, if I understand you, these causes must be things that put it beyond your control? A. Precisely.

"Q. That do not grow out of any question of your own exercise of diligence and things of that kind?

"A. That is exactly the case, your Honor, the whole validity of the canner's contract providing for a pro rate delivery. It depends, as counsel said, very largely on the good faith of the canner. If there was a tendency to bring in extraneous reasons which would excuse him from making a full delivery, it would strike at the validity of the contract and make it impossible for us to deal with the trade on a pro rate contract; consequently, in trade practice and in aspects of the trade, I think I am perfectly safe in saying that the disposition has been, even among the canners themselves, to compel their people in similar lines of business to live strictly up to the terms of the contract and interpret the short pack entirely within what might be regarded as arising only from natural causes; that is to say, a short pack would only be justified where the conditions arose from natural causes.

"The point I am trying to make, your Honor, is simply, if the industry is able to continue operating along the lines of selling for fall delivery or delivery of the goods to be made hereafter, it is going to continue to divide the crop hazard risk with the grower and with the trade, he must be able at all times to justify his position with the trade and convince the body that he is acting not only in good faith, but that he is acting with reasonable care and diligence, and that he is not going to fall back on the short delivery clause of his contract for reasons unless they be extraordinary or unusual, or conditions that are absolutely beyond his control.

"Q. Now, this machinery was installed in 1916, and never, theretofore, according to the testimony of the witnesses, had been applied to that purpose before; it was a vacuum process containing a large number of tubes, 204 tubes to the pan; it develops that these tubes choked up to the extent that they had to be drilled out with electric drills, sometimes requiring an hour and sometimes days at a time. In the following year that was remedied by discovering that a larger tube would accommodate the material and not stick so easily. Assuming that the canner, with the knowledge of the purchaser, goes out to install machinery and did install the best machinery that he could find adaptable to the purpose, to his knowledge, and operated it conscientiously with his engineers, and in spite of his efforts was unable to produce more than sufficient to make a pro rate delivery. Would not those causes be taken into consideration by the trade?

"A. I should think not.

"Q. You think not. Now, do you know anything at all, Mr. Bentley, concerning the acreage which was under contract to supply the Greco Canning Co. in 1916? A. I do not.

"The COURT. He said a while ago he did not.
"Mr. MCNAB. Q. You do not know anything about the tonnage they produced? A. No."

An examination of the testimony of the witnesses Berne, Hoffman, Crary, Hume, Sussman and Chase will show that not one of them testifies directly that the term "short pack", as understood in the trade, does include a failure to deliver by reason of defective machinery or experimental machinery, which fails to work in spite of everything the packer does to make it work. We think the court was justified in concluding from the evidence that the term "short pack" was never intended to cover the failure of machinery,—experimental or otherwise,—and that the real reason for its adoption was, as Mr. Bentley said, the outcome of an effort to divide the *hazard of crops.* This is a reasonable and sensible construction of the term, and it is supported by the evidence.

CAUSE BEYOND CONTROL.

If failure of machinery is not included within the meaning of the term "short pack", then the question we have to decide is, whether or not the failure of machinery, under the circumstances of this case, was a cause beyond the control of the plaintiff in error. We believe that this question is settled by the authorities.

In

Carnegie Steel Co. v. United States, 240 U. S. 156; 60 Law Ed. 576,

the steel company agreed to make certain eighteen inch armor plates for ballistic tests. The steel company did not know the proper formula for hardening these plates, and were forced to experiment, with the result that there was a considerable delay in delivery. In making tests to determine the proper formula, the steel company used all due diligence and dispatch. The court said, at page 164 (579 Law Ed.):

> "It will be observed that the point in the case is a short one. It is whether the causes of delay alleged in the petition were unavoidable, or were of the character described in the contract; that is, 'such as fires, storms, labor strikes, action of the United States, etc.' The contention that the alleged causes can be assigned to such category creates some surprise. *It would seem that the very essence of the promise of a contract to deliver articles is ability to procure or make them.* But claimant says its ignorance was not peculiar, that it was shared by the world, and no one knew that the process adequate to produce 14-inch armor plate would not produce 18-inch armor plate. Yet claimant shows that its own experiments demonstrated the inadequacy of the accepted formula. *A successful process was therefore foreseeable and discoverable.* And it would seem to have been an obvious prudence to have preceded manufacture, if not engagement, by experiment rather than risk failure and delay and their consequent penalties by extending an old formula to a new condition."

Again, on page 165 (579 Law Ed.), the court said:

> "It was said, however, in The Harriman, that 'the answer to the objection of hardship in all such cases is that it might have been guarded

> against by a proper stipulation', and such a stipulation is relied on in the case at bar. Ignorance of the scientific process necessary for face-hardening 18-inch armor plate is asserted to be an unavoidable cause of the character of the enumeration of article 8 of the contract; that is, such as fires, storms, labor strikes, action of the United States, etc.' The contention is that it is the same 'genus or kind', because (1) it was not foreseeable when the contract was made; (2) was not the result of any act or neglect on the part of the claimant; (3) was not a cause the company could prevent. What we have already said answers these contentions. Ability to perform a contract is of its very essence. It would have no sense or incentive, no assurance of fulfilment, otherwise; and a delay resulting from the absence of such ability is not of the same kind enumerated in the contract—is not a cause extraneous to it and independent of the engagements and exertions of the parties."

This decision seems to fit our case. The defendant in this case did find out what was the matter with the machinery, and remedied it by putting in bigger tubes. To use the language of the Supreme Court,—"a successful process was, therefore, foreseeable and discoverable", and the defendant in this case ought "to have preceded manufacture, if not engagement, by experiment, rather than risk failure and delay."

In

Morgan v. Lyall, 16 Quebec King's Bench (1907), page 562,

the court said at page 568:

> "The learned judge in the Superior Court found that the damage sustained by Lyall for nondelivery was twenty cents a barrel, and we

see no reason for differing from that estimate, and therefore we are of opinion that twenty cents a barrel should be allowed on this deficit of 10,468 barrels. The learned judge in the court below upheld the plea of Morgan that he had been prevented from manufacturing this quantity by *force majeure*. This court is not able to concur in that view. We find no *force majeure* in the case. The clause of the contract does little more than recognize the principle of our code and of the common law, as regards exemption for *force majeure*. Here is what the contract itself says: 'It is understood that the party of the first part shall not be held liable for damages if, at any time, by failure in supply of electric power, the occurrence of a strike, or other cause beyond his control, it becomes impossible to fulfil the contract.' Now, the test of *force majeure* is not the inconvenience of carrying out the contract; it is not the increased cost of carrying out the contract, but the impossibility of carrying out the contract; and that is all that we find Morgan stipulated for: the impossibility of carrying out the contract, being prevented by some cause beyond his control, and that this only expresses the common law principle, with the addition of the occurrence of a strike, which would not be *force majeure* had it not been stipulated.

"We have therefore to decide whether in reality Morgan was prevented by *force majeure;* that is to say, that it was impossible for him to carry out this contract. Well, we find as regards manufacturing with this electric power, that the impossibility arose from his own defective dynamos, from his own defective electric apparatus, and not from any want of supply of electric power. We think when the contract says that he shall not be responsible if prevented by failure in supply of electric power; we think that that does not apply to his own dynamos. Who

supplied him with electric power? It was probably the Montreal Light, Heat and Power Company that controls the electricity here. It was they that supplied him, and in the contract what is meant by supplying electric power? It refers to the person who supplies him with that power. It certainly does not refer to a defect in his own machinery or apparatus. We therefore think that Morgan cannot plead the defect in his own dynamo. He might have had all the supply of electric power he wanted, if it had not been for his own defective machinery."

In

Connorsville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123; 76 N. E. 294,

we find the following in the syllabus:

"In an action for breach of contract to furnish wheels, an answer presenting a defense on a provision making 'unavoidable cause' an excuse for failure to perform is not sufficient to bar the action, where it alleges that the failure was caused by the giving way of the foundation of the engine, the delay of plaintiff in giving orders, and the extraordinary demand for material necessary to manufacture the wheels, all of which, without fault of defendant, and that defendant in good faith complied with the contract, except in as far as it was prevented from doing so by such unavoidable causes."

In

Pacific Sheet Metal Works v. California Canneries Co., 164 Fed. 980,

the term "unavoidable casualty" was held not to include the non-arrival of a cargo of tin, due to adverse weather. The court said, at page 984:

"3. The finding that plaintiff in error shipped a large quantity of tin upon the ship Ancois, and that such ship was delayed in reaching San Francisco on account of the storms and winds encountered by her on the voyage from Liverpool, does not constitute a defense to the action. Such finding is not sufficient to show that the plaintiff in error was prevented from the performance of its contract by reason of 'damage by the elements, or any unavoidable casualty'. If the contract had contained an express or implied stipulation that the cans plaintiff in error agreed to deliver were to be manufactured from the tin then laden on the Ancois and to be by her brought from Liverpool to San Francisco, around Cape Horn, the question would be different from the one now before us. Anderson v. May, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642; Stewart v. Stone, 127 N. Y. 502, 28 N. E. 595, 14 L. R. A. 215. But there was no such express stipulation, and there is nothing in the nature of the contract itself, when considered in connection with the surrounding circumstances and situation of the parties, to authorize the court to construe it as containing such an implied condition or stipulation. The contract was an absolute one upon the part of the plaintiff in error to deliver the cans referred to in the contract, unless prevented from so doing by an unavoidable casualty or by reason of damage from the elements. If the plaintiff in error did not have on hand a sufficient quantity of tin for the manufacture of the cans contracted for, it was free to adopt any course to procure the tin needed to carry out the contract, which its judgment might suggest. It was not restricted to shipping the same around Cape Horn, on the Ancois. It had the right under its contract to import the tin into New York and then bring the same by rail to San Francisco, and it cannot be excused from per-

formance by reason of the facts that it chose to rely upon the ability of the Ancois to make the voyage around Cape Horn within such time as would permit it to fulfill its contract, rather than to have the tin brought from New York by rail, and that the vessel was delayed by storms and winds beyond the time usually consumed on such a voyage."

In

American Bridge Co. v. Glenmore Distilleries Co., 107 S. W. 279 (1908, Ky.),

there was a contract to construct a steel tower, but the contractor was not to be "responsible for delays in transportation, strikes, fires, floods, storms, nor any other circumstance beyond its reasonable control". The court said, at page 283:

"Nor do we think that the inability of the plaintiff to get the material with which to construct the tower from the rolling mills, with which it was connected, in sufficient time to complete its contract with appellee within the 45 working days from September 12, 1901, was a cause beyond its reasonable control within the meaning of the contract under discussion. The provision as a whole is as follows: 'And it is further understood that the party of the first part (appellant) shall not be held responsible for delays in transportation, strikes, fires, floods, storms, nor for any other circumstances beyond its reasonable control. Under the familiar rule of ejusdem generis, the general language following the specific enunciation of the causes which prevented the appellant from being responsible for nonperformance of its contract within the stipulated time must be limited to include causes similar to those specifically set out; and, under this rule, we think it clear that

> the failure of the appellant to provide material with which to carry into effect its contract was not a circumstance beyond its reasonable control. None of the specified causes for nonresponsibility could possibly be controlled by any foresight on the part of the appellant; but foresight would undoubtedly suggest, before making a contract so urgent in its nature as the one before us, that the material with which it was to be carried into effect should have been secured in advance, at least, foresight and diligence would have secured the material in advance, and therefore the failure to exercise these cannot be said to be a cause for nonfulfillment beyond the reasonable control of the appellant."

In

New York Coal Co. v. New Pittsburgh Coal Co., 99 N. E. 198 (1912, Ohio),

there was a lease of a coal mine which provided that the lessee should take the coal from the mine and pay to the lessor a certain minimum royalty. It further provided:

> "It is hereby understood and agreed by and between the parties hereto, that in case and so long as it shall be impossible to mine and remove said amount by reason of strikes, lockouts, fires, floods, or any other cause beyond the control of the second party, lack of transportation facilities excepted, the said minimum shall not apply."

The causes relied upon by the defendant were, the objection and refusal of the miners to work in a certain part of the mine, and the inability of the defendant to mine coal from that part of the mine, because of its physical condition. The court refused

to allow the introduction of any of this evidence, on the ground that it did not tend to prove any cause beyond the control of the defendant, saying at page 206:

> "This brings us to a consideration of that clause, and of the meaning of the phrase 'or any other cause beyond the control of the second party', as therein used. We have already indicated the contention of defendant that this clause should not be limited to temporary causes or those similar to the ones specifically mentioned by the rules *noscitur a sociis* and *ejusdem generis,* but that it includes a condition of affairs such as defendant claims to have existed and to now exist. The clause itself, however, clearly shows that temporary conditions only were in the minds of the parties, as indicated by the use of the words 'in case and so long as it shall be impossible to mine and remove', etc. Then follow certain specified causes which shall suspend the operation of the minimum royalty, viz., strikes, lockouts, fires, and floods, none of which can be fairly said to have been considered by the parties as permanent obstacles to the operation of the mine. This would seem to be emphasized by the exception to 'other causes beyond the control of the second party', viz., 'lack of transportation facilities', which would not relieve the lessee, and could hardly have been considered by the parties as a matter of permanent disability. The rule ejusdem generis is a well-known rule of construction, and has been frequently recognized and applied in this state and elsewhere. While not conclusive under all circumstances, nor applied when it would violate the clear intention of parties as expressed in their written agreements, nevertheless it is of value whenever there would be no such violation, and this is a case where the rule seems to be plainly applicable.

"Furthermore, the conditions which the parties evidently had in mind that would excuse the lessee from the payment of the minimum royalty were undoubtedly such as might arise in the future, and render it impossible for him to carry out his agreement. The very nature and character of those enumerated would seem to make that plain and negative the idea that the physical condition or geological formation of the property, which was necessarily in existence at the date of the lease and would, of course, be permanent, was also to be included among these temporary suspensions of the lessee's liability."

In

Simpson Bros. Corporation v. John R. White & Son, Inc., 187 Fed. 418,

the court had under consideration the meaning of the term "causes beyond the control of the contractor". Commenting upon inability to get material as one of these causes, the court said, at page 424:

"The mere failure to get material from one materialman cannot be regarded as a cause of delay beyond the control of the contractor, unless the material be proved to be of such peculiar character that it is not otherwise procurable. The failure of a business arrangement made between the contractor and those who supply him with materials, or the failure of prompt delivery of materials ordered from a distance by carrier, is an ordinary business contingency to be provided for by the contractor, and the risk of delay from causes of this character cannot be thrown upon the owner under a clause of this kind by evidence of the mere occurrence of the fact, without additional evi-

> dence showing that the contractor was practically limited to a definite source of supply, and that he could not be expected under the requirement of reasonable diligence to procure his material elsewhere."

In

Vredenburgh v. Baton Rouge Sugar Co., 28 So. 122 (1899, La.),

a planter agreed to furnish cane to a company engaged in grinding the same and manufacturing sugar therefrom. The contract authorized the company to stop receiving cane in certain cases, and provided for the discontinuance of operations, in the event of its machinery becoming permanently disabled, "in consequence of fire, want of water, breakdown, labor strikes, or any other cause beyond its control". The court held that where the discontinuance of operations was attributable to the ignorance, mismanagement or incompetence of the representatives of the company with respect to the construction and operation of the sugar-making plant, the clause would not excuse. The court said, at page 129:

> "The trouble arising from the lack of skill and experience is made manifest from the admission of the defendant's representative, in various letters written by him and in his evidence on the trial, from which it appears that there was, from the beginning, miscalculation, or no calculation, as to the quantity of cane which could be consumed in the daily operation of the mill, and as to the handling of the loaded cars, so that the factory was chronically in a state of congestion, a large proportion of the cane turned sour before it was ground, and both

time and money were lost in the attempt to make sugar from the sour cane. In this connection it is significant that, while for the season in question the defendant had contracted for 16,000 tons of cane, it contracted the next year for a much smaller quantity, and ground only about 3,500 tons, although it claims to have improved its plant in the meanwhile.

"Our conclusion, therefore, after a re-examination of this case, is that the defendant failed from the beginning to comply with its contract, not so much by reason of any of the conditions provided for therein, as because of the ignorance and lack of experience of its representatives; and that its discontinued operations before the close of the season, not because of the settling of the building, but because, having no skilled head in charge, and the capacity of the plant having been overrated, it found that it was not only inflicting loss upon others, but was losing money itself."

We do not mean by this citation to intimate that the Greco Company's officers and employees were incompetent, but their own testimony shows that they were ignorant of the construction and operation of vacuum pan machinery. It took them the whole season of 1916 to find out what was the matter with their paste line. Ordinary prudence, as the United States Supreme Court intimated in the *Carnegie Steel Case,* ought to have suggested to them the importance of experimenting before selling the product to be made by the vacuum pans.

It is not an unreasonable thing to require of a man who agrees to manufacture a certain article, that he put himself in a position to do so by first

getting the necessary knowledge and making the necessary experiments to know what he is about. There could be no security whatever for the purchaser of manufactured goods if the manufacturer is to be excused because his machinery won't work. "It would seem that the very essence of the promise of a contract to deliver articles is ability to procure or make them." It seems obvious that defendant's machinery trouble was not a cause beyond its control. The defendant could have designed this machinery and experimented with it and found out what was the matter with it and remedied the fault before agreeing to make and deliver Salsa de Pomidoro. He did not do this, and he should not now be allowed to shift the loss resulting from his experiment from his own shoulders, where it belongs, to the shoulders of his purchasers.

PRACTICAL CONSTRUCTION OF THE AGREEMENT.

Counsel for plaintiff in error insist that the parties themselves acted upon and placed a practical construction upon the language of their agreement, and cite authorities to the effect that where parties to a contract have so construed and interpreted it the courts generally adopt that construction in arriving at the medium of the contract.

The true rule is stated in *Sternbergh v. Brock,* 225 Pa. 279, at 287; 74 Atl. 166. It is as follows:

> "It ought to appear with reasonable certainty that they were acts of both parties done with

> knowledge and in view of a purpose at least consistent with that to which they are now sought to be applied."

The first time Mr. Greco notified Pastene & Co. that he was not going to be able to make more than a 25% delivery was on October 12, 1916. In that letter (Transcript page 42) Mr. Greco not only said that he was having trouble with his machinery, but added:

> "For your information we may also add that the crop this year is very short, as we have had considerable rain, which has caused much damage."

Everything that Pastene & Co. said in their letters is to be interpreted in the light of the fact that they had constantly in mind Mr. Greco's claim that there was a short tomato crop. They were, of course, willing to do the decent thing. In their letter of October 25, 1916 (Transcript page 45) they say:

> "At this time we will only state that if you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you. It is obvious, naturally of course, that in any case we shall expect a full pro rata delivery of all such goods as you are successful in producing."

It does not seem to us that Messrs. Pastene & Co. could be penalized because they stood ready to meet Mr. Greco half way and did not immediately begin to insist upon their legal rights under the contract. They had in mind that Greco had two difficulties to

contend with, namely, bad machinery and short crop. This is clearly shown by their letter of November 7, 1916 (Transcript page 48):

"Boston, November 7th, 1916.

"The Greco Canning Co.,
San Jose, California.

Gentlemen:

Confirming ours of the 30th ultimo.

Samples: The duplicates which you have sent to us by express came to hand a day or two ago, and upon examination we find that in fact, as you previously advised, the concentration is not all that it should be. However, considering the unfortunate circumstances which you have encountered, as explained to us in your recent favors, we have no complaint to offer, and providing the delivery you make to us is equal to the sample received, we shall consider the delivery a good one.

Shipment: We had rather hoped to have received definite advice that shipment which your telegram of October 26th advised would probably go forward in a day or two, was not actually on the way. We certainly trust that there will be no particular delay in the forwarding of this lot and that we may hear from you now any day that the goods are in transit:

Pro rata: We understand that weather conditions have greatly improved during the last ten days in your country and that a long packing season is anticipated. We surely trust that these predictions may not miscarry, as in that case we are confident you will find it possible to considerably increase the production which you previously estimated as possible. As previously written you, we certainly have no intention of being unreasonable or expecting from you that which it is physically impossible for you to accomplish, but we do expect, of course, that you will spare no efforts to, as nearly as

possible, fill your contracts, and it is for this reason that knowing that conditions have materially improved since you previously wrote us on the subject, we look forward to a better delivery than previously predicted. Knowing that you will not spare any reasonable efforts to attain the desired result, we look forward in anticipation to your more favorable news as mentioned.

Yours respectfully,
P. Pastene & Co., Inc. P. R. Pastene."

In other words, *they believed that there was really a short crop of tomatoes, and everything they wrote to the Greco Canning Company was written with that in mind.*

Before the court can say that an act done or a thing said amounts to a construction placed upon a contract by a party thereto, it must appear that the act done or the thing said was "done with knowledge". At the time of the correspondence, that is to say, during the season of 1916, Pastene & Co. did not know what the evidence in this case has disclosed in regard to the tomato crop, and it did not know what the evidence has entirely failed to disclose in regard to the *relation between the acreage contracted for by the defendant and the amount of tomato products Greco sold against that acreage.* It seems plain to us that nothing found in the letters of Messrs. Pastene & Co. amounts to a construction placed upon the contract. They simply showed a disposition not to take advantage of the defendant's misfortune. They probably changed their minds after an unsuccessful attempt to adjust the matter.

Counsel strenuously contend that the contract was for a product of the Greco Company's cannery. This was admitted from the start. We have never made any claim that Mr. Greco ought to have gone into the market and bought the canned salsa. What we do contend is that he should have tried to get *tomatoes* elsewhere. Mr. Greco testified that he found out that his acreage was insufficient, due to rain and frost, right at the beginning. He tried to get tomatoes only in Santa Clara Valley, at Manteca and at San Francisco. He could not name a farmer who had been approached at Manteca. At San Francisco he simply went into the commission district, but made no arrangement with any dealer (Transcript page 86).

We believe that the testimony in this case, including that of Mr. Leal Davis, Mr. Greco's engineer, shows conclusively that the paste line was never stopped for lack of tomatoes, but that Mr. Greco's whole trouble was with the machinery. The case of *Carnegie Steel Co. v. United States,* 240 U. S. 156; 60 L. Ed. 576, completely disposes of this branch of the case.

On page 18 of their brief counsel for plaintiff in error attempt to distinguish this case on the ground that the difficulties there were unforeseen and that in our case the difficulties were foreseen. One of the points made by the Supreme Court in that case was the following:

> "A successful process was therefore foreseeable and discoverable."

If Mr. Greco wanted Mr. Pastene to share with him the risk of his machinery experiment, why did Mr. Greco say when he was trying to get an order from Mr. Pastene that he knew all about making the salsa. His words were (Transcript page 43):

> "As we are Italians and know what the Italian people must have and being very familiar with the method of manufacturing this article you can rest assured that it will be the equal of that imported from Italy."

It seems perfectly clear that Mr. Greco represented that he knew about the machinery and that he was willing to take the chance of its success. Without making any experiment with the machinery he contracted to deliver its product. After the experiment he found out what was wrong with the machinery, remedied it, and since then has had no trouble. He now asks the court to make his purchaser stand the cost of his experiment.

He says that there was a short crop of tomatoes, but he failed to tell the court how many tomatoes he had contracted to sell. He expected to get 5,500 tons of tomatoes. He might have sold 20,000 tons and thus created his own shortage by overselling his acreage. But he did not, or would not, tell *how many tons he had contracted to sell.*

The difference between the contract price and the market price at the time and place of delivery was seven thousand two hundred fifteen & 15/100 dollars ($7,215.15). The trial court allowed plaintiff in error a 20% abatement. This was not correct, be-

cause Mr. Greco did not furnish figures to show the relation between the acreage he contracted for and the amount of tomatoes he had contracted to sell. The contention of plaintiff in error should be answered by increasing the judgment to seven thousand two hundred fifteen & 15/100 dollars ($7,215.15) and affirming it as modified.

Dated, San Francisco,
October 17, 1921.

Respectfully submitted,

WILLIAM THOMAS,
LOUIS S. BEEDY,
JAMES LANAGAN,
THOMAS, BEEDY & LANAGAN,
Attorneys for Defendant in Error.

No. 3750

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GRECO CANNING COMPANY
(a corporation),
Plaintiff in Error,

vs.

P. PASTENE & COMPANY, Incorporated
(a corporation),
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF DEFENDANT IN ERROR.

WILLIAM THOMAS,
LOUIS S. BEEDY,
JAMES LANAGAN,
THOMAS, BEEDY & LANAGAN,
Alaska Commercial Building, San Francisco,
Attorneys for Defendant in Error and Petitioner.

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(a corporation),
Plaintiff in Error,

vs.

P. PASTENE & COMPANY, Incorporated
(a corporation),
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF DEFENDANT IN ERROR.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of defendant in error for a rehearing in the above entitled matter heretofore presented to this Honorable Court upon a writ of error from the decision of the Honorable William C. Van Fleet, District Judge, theretofore made and entered in favor of your petitioner on or about the 30th day of August, 1920, respectfully represents:

I.

That this Honorable Court has apparently disposed of said appeal adversely to this petitioner upon a theory of defense not set out in the answer of plaintiff in error nor raised at the trial of the cause in the court below, and the failure to consider which was not specified and/or assigned to this court by plaintiff in error as one of the alleged errors committed by the trial court, to wit, upon the theory that:

> "Both of these parties knew that the article in question had never been produced in this country and that new machinery was essential to its manufacture *and they contracted with reference to that fact.*" (Opinion of the Court, page 7, paragraph 2. The italics are our own.)

and the deduction of the court from the above that:

> "The provisions of the contract to the effect that the seller should be relieved of his obligations thereunder in the event that performance thereof was prevented by a 'strike, fire or other circumstance beyond his control', protected the plaintiff in error from the liability imposed by the judgment complained of." (Opinion of the Court, page 3, paragraph 4.)

II.

That owing to the foregoing your petitioner has not been heretofore and was not upon the presentation of the appeal before this Honorable Court, given the opportunity properly to present its views or to furnish the court with arguments and au-

thorities bearing upon the view of this Honorable Court hereinabove set forth.

III.

That your petitioner is entitled to a rehearing before this Honorable Court because of the following facts disclosed by the record and the conclusions of law derived therefrom, which it is contended with the utmost seriousness are at variance with the above expressed views of this Honorable Court in the above entitled matter, to wit the fact that:

1. The product contracted for, known as Salsa De Pomidoro, while it had not been hitherto manufactured in the United States was an article frequently and widely manufactured in Italy for a great many years prior to the making of said contract. (There is no conflict in the testimony upon this point.)

2. That Victor V. Greco, who conceived the idea of manufacturing domestically this product for the Greco Canning Company, and Charles Pastene, who represented your petitioner in the transaction for the purchase of the same, were both Italians and were at the time of making the said contract and prior thereto, familiar with the product and its manufacture.

Under date of January 5, 1916, plaintiff in error wrote to petitioner as follows:

> "As we are Italian and know what the Italian people must have and *being very familiar with the method of manufacturing this article* you can rest assured that it will be the equal of that imported from Italy." (Defendant's Exhibit M; transcript p. 161 at p. 62. The italics are our own.)

3. That the only light in which the parties regarded the proposed manufacture of this product as an experiment in reference to which they contracted, was in the light of the *quality* to be produced.

4. That the record fails to disclose the existence of any doubt in the mind of either party at the time of contracting, as to the ability of plaintiff in error to procure machinery adequate to produce the *quantity* of the product ordered by your petitioner.

On page one hundred twenty-five of the transcript, paragraph three, Mr. Victor V. Greco testifies as follows:

> "There was nothing said between us respecting the installation of any particular form of machinery or whether such machinery was to be had in the United States."

5. That on the contrary the record shows that plaintiff in error expressly represented to your petitioner at, and prior to, the time when the contract between them was made, that said Greco Canning Company was in all respects familiar with the method of the manufacture of the product known as Salsa De Pomidoro, and was fully capable

of producing machinery adequate not only for the manufacture of the quantity ordered by your petitioner but a much larger quantity during the season of 1916.

(Letter of January 5, 1916, from Greco Canning Company to P. Pastene & Company, defendant's Exhibit "M", transcript pages 61 and 62.

Letter from Greco Canning Company to P. Pastene & Company under date of March 29, 1916, defendant's Exhibit "S", transcript pages 69 and 70.

It will be noted from these letters that Greco Canning Company does not state that it is about to *experiment* with packing Salsa De Pomidoro but that it is about to, and is actually going to, manufacture that product and is ready to take orders.)

6. That the sole reason for the failure of plaintiff in error to produce the quantity of Salsa De Pomidoro it had contracted to deliver to your petitioner lay in its failure, prior to the time of manufacturing, to provide itself with adequate machinery, i. e., with vacuum pans, the tubes leading from which were of adequate size to prevent clogging.

(Testimony of Victor V. Greco, transcript page 34, paragraph 3.)

7. That the inadequacy of the machinery provided by plaintiff in error was foreseeable, and could have been foreseen and remedied by the exercise of due diligence on the part of plaintiff in

error prior to the time of contracting with your petitioner and the time of entering upon the actual process of manufacture pursuant thereto.

(Testimony of Victor V. Greco, transcript page 34, paragraph 3. See also letter from Greco Canning Company to P. Pastene & Company dated December 26, 1916, transcript page 55, the last paragraph thereof on page 56.)

8. That the production of adequate machinery was at all times a matter within the control of, and subject only to the diligence of plaintiff in error in procuring the same.

9. That none of the correspondence of petitioner subsequent to the contract, relied on by the plaintiff in error as showing that the parties by their acts and declarations placed upon the contract the construction contended for by the latter, contains a definite agreement by petitioner to accept such construction, and all of it is colored by the misapprehension of petitioner to the effect that plaintiff in error was justifying his offer of pro rata delivery by reason of a crop failure, which would have justified such pro rata, rather than by reason of the plain inadequacy of its machinery, which was the fact.

(See letter from P. Pastene & Company to Greco Canning Company under date of November 7, 1916, Defendant's Exhibit "E", transcript page 48, paragraph entitled "Pro rata".)

10. That the effect of the ruling of this Honorable Court, reconsideration of which is hereby sought, is to permit a manufacturer, who has represented as a fact his ability to manufacture a given quantity of a given article of commerce, to experiment with such manufacture at the expense of a purchaser who has honestly believed and acted upon such representations as to ability by entering into a contract.

IV.

That the conclusions of law deducible from the above facts and from the record are as follows:

1. That with the exception of the clauses of the contract relating to "short pack" and to prevention of performance by "a strike, fire or other circumstance beyond control", plaintiff in error bound itself absolutely by the contract in question to deliver to petitioner the amount of Salsa De Pomidoro specified by such contract.

2. That plaintiff in error has failed to establish performance of the said contract by pro rata delivery under the "short pack" clause thereof.

(See evidence cited and comments thereon in brief for defendant in error, pages 12-18.)

3. That plaintiff in error and petitioner did not expressly or impliedly contract with reference to the ability of Greco Canning Company to procure

machinery adequate to the manufacture of the amount of Salsa De Pomidoro contracted for.

The mutual knowledge of the parties as to the character of the product and the positive assertions of plaintiff in error as to its ability to manufacture the same, absolutely preclude such inference. The very essence of a contract to deliver articles is ability on the part of the promisor to procure or make them.

Carnegie Steel Co. v. United States, 240 U. S. 156; 60 Law Edition 576.

4. The inadequacy of the machinery provided by plaintiff in error for the purpose of fulfilling its contract was not a "cause beyond its control" within the meaning of such contract, excusing performance.

The record shows that a successful and adequate process was afterward discovered by experiment and was, therefore, as a matter of law and fact, foreseeable from the outset. It could and would have been discovered had plaintiff in error exercised due diligence in ascertaining the size of vacuum tubes used by successful Italian manufacturers of the product or if plaintiff in error had been sufficiently diligent, prior to the attempted execution of petitioner's order, to make the very same experiment which it did make on the product ordered by petitioner. It was the duty therefore of plaintiff in error to discover that successful and adequate process, especially after positively repre-

senting that it had done so, before entering into obligations which its own lack of diligence made it impossible to fulfill.

Carnegie Steel Co. v. United States (supra);
Morgan v. Lyall, 16 Quebec King's Bench (1907), page 562;
Connorsville Wagon Co. v. McFarlan Carriage Co., 166 Indiana 123; 76 N. E. 294;
New York Coal Co. v. New Pittsburg Coal Co., 99 N. E. 198 (1912, Ohio);
Simpson Bros. Corporation v. John R. White & Son, Inc., 187 Fed. 418;
Vredenburgh v. Baton Rouge Sugar Co., 28 So. 122 (1899, La.).

5. The parties did not subsequently, by their conduct or otherwise, place upon the contract any practical construction which would justify plaintiff's failure fully to perform in the event of the inadequacy of its machinery.

The record nowhere shows that plaintiff in error ever gave the contract such a construction. Its attempts prior to the trial of this case to justify pro-rata delivery were not based upon the inadequacy of its machinery, but solely upon the alleged shortage of the tomato crop, and that was the sole justification thereof set up by it in the pleadings (see answer, transcript, pp. 10-15). We do not hear of this attempted justification due to inadequacy of machinery until it appears in defendant's opening statement on the day of the trial. It was a mere afterthought.

Moreover, none of the correspondence of petitioner relied on as establishing this contention, contains an unqualified acceptance of such construction. At most it shows no more than an inclination on the part of petitioner at the time the letters were written to deal as leniently as possible with the short-comings of plaintiff in error, and not to insist upon its full legal rights. Moreover all of the correspondence so relied upon is tinged with the misapprehension of petitioner as to the nature of the excuses being made by plaintiff in error for tendering only pro rata, i. e., in the misapprehension due to the representations made by plaintiff in error that the offer of pro rata was occasioned by the failure of the tomato crop, rather than by the inadequacy of the machinery provided by Greco Canning Company. In other words they were not the *"acts of both parties done with knowledge in view of a purpose * * * consistent with that to which they are * * * to be applied"*.

Sternbergh v. Brock, 225 Pa. 279 at page 287; 74 Atlantic 166.

Further requesting that a rehearing of the above entitled matter be granted, your petitioner represents:

I.

That the court below erred in allowing to plaintiff in error an abatement of twenty per cent (20%)

of the amount which it had contracted to deliver by reason of the alleged shortage of the tomato crop during the 1916 season, and as the basis of such contention in this respect specifies the following facts which it desires to represent to this Honorable Court:

1. That there is in the record no evidence to show that the paste line machinery of plaintiff in error used in the manufacture of the product contracted for, was ever shut down during the season of 1916 for lack of tomatoes and that *there is evidence* in the record to show *that such paste line machinery was never shut down for lack of tomatoes.*

2. There was no evidence offered by plaintiff in error to the *ratio* existing between the number of acres of tomatoes it contracted for and the number of acres it contracted to sell. In other words for aught that appears of record, and in spite of numerous requests for such testimony, plaintiff in error has failed to show that it did not create its own tomato shortage by selling more tomatoes than it had a right to expect from the acreage it had under contract.

It is confidently asserted by your petitioner that the foregoing state of the record supports the conclusion that plaintiff in error was not prevented *by a crop shortage due to causes beyond its control* from performing in full its contract with your petitioner.

Therefore, in order that your petitioner may have the opportunity of more fully and fairly presenting to this Honorable Court the matters hereinabove outlined, and that right and justice may be done, your petitioner through Messrs. Thomas, Beedy & Lanagan, its attorneys, respectfully requests that a rehearing of the above entitled matter be granted to said petitioner by this Honorable Court.

Dated, San Francisco,
February 6, 1922.

Respectfully submitted,

WILLIAM THOMAS,
LOUIS S. BEEDY,
JAMES LANAGAN,
THOMAS, BEEDY & LANAGAN,
Attorneys for Defendant in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for defendant in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
February 6, 1922.

LOUIS S. BEEDY,
Of Counsel for Defendant in Error and Petitioner.

No. 3751

United States

Circuit Court of Appeals

For the Ninth Circuit.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellant,

vs.

YOUNG YEN and YOUNG SOON,

Appellees.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Attorneys of Record.

For Petitioner and Appellee:

GEO. A. McGOWAN, Esq., San Francisco, Cal.

For Respondent and Appellant:

UNITED STATES ATTORNEY, San Francisco, Cal.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,215.

In the Matter of YOUNG YEN and YOUNG SOON, on Habeas Corpus.

Praecipe for Transcript of Record.

To the Clerk of Said Court:

Sir: Please make copies of the following papers to be used in preparing transcript on appeal:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Demurrer to petition.
4. Order overruling demurrer and directing that writ of habeas corpus issue returnable June 27, 1921.
5. Writ of habeas corpus and marshal's return of service.
6. Return to writ of habeas corpus.
7. Traverse to return.
8. Order discharging petitioners, dated July 2, 1921.

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*Page-number appearing at foot of page of original certified Transcript of Record.

9. Notice of appeal.
10. Petition for appeal.
11. Assignment of errors.
12. Order allowing appeal.
13. Citation on appeal.
14. Stipulation of attorneys and order of the Court that Respondent's Exhibits "A," "B," "C," "D," "E" and "F," being the record of the Bureau of Immigration, be transferred to the United States Circuit Court of Appeals for the Ninth Circuit, to be considered in their original form, and without being transcribed or copied.
15. Order transmitting original exhibits to Appellate Court. [1*]

FRANK M. SILVA,
United States Attorney.
BEN. F. GEIS,
Assistant United States Attorney.

Receipt of service of copy of the within praecipe for transcript of record is acknowledged this 25th day of July, 1921.

GEO. A. McGOWAN,
Attorney for Appellees.

[Endorsed]: Filed Jul. 25, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,215.

In the Matter of YOUNG YEN and YOUNG SOON (19981/15–6 and 7 Ex. SS. "Nile" 2/21/21), on Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the Honorable, United States District Judge, Now Presiding in the United States District Court, in and for the Northern District of California, First Division:

It is respectfully shown by the petition of the undersigned that Young Yen and Young Soon, hereafter in this petition referred to as "the detained," are unlawfully imprisoned, detained, confined and restrained of their liberty by Edward White, Commissioner of Immigration for the port of San Francisco, at the Immigration Station at Angel Island, county of Marin, State and Northern District of California, Southern Division thereof; that the said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained are Chinese persons and aliens not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6th, 1882, July 5th, 1884, November 3d, 1893, and April 29th, 1902, as amended

and re-enacted by Section 5 of the Deficiency Act of April 7th, 1904, which said Acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner, intends to deport the said detained away from and [3] out of the United States to the Republic of China.

That the said Commissioner claims that the said detained arrived at the port of San Francisco on or about the 21st day of February, 1921, on the SS. "Nile," and thereupon made application to enter the United States as the sons of native-born citizens thereof, and that the applications of the said detained to enter the United States as citizens thereof were denied by the said Commissioner of Immigration, and that appeals were thereupon taken from the excluding decision of the said Commissioner of Immigration, to the Secretary of the Department of Labor, and that the said secretary thereafter dismissed the said appeals; that it is claimed by the said Commissioner that in all of the proceedings had herein the said detained were accorded a full and fair hearing; that the action of the said Commissioner and the said secretary was taken and made by them in the proper exercise of the discretion committed to them by the statute in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner, on his information and belief alleges that the hearing and proceedings had herein, and the action of the said

Commissioner, and the action of the said Secretary was and is in excess of the authority committed to them by the said rules and regulations and by said statutes and that the denial of the application of the said detained to enter the United States as the sons of native-born citizens thereof, was and is an abuse of the authority committed to them by the said statutes in each of the following particulars hereinafter set forth:

Your petitioner alleges upon his information and belief [4] that the evidence presented before the immigration authorities upon the applications of the said detained to enter the United States, which said evidence is now hereby referred to with the same force and effect as if set forth in full herein, was of such a conclusive kind and character establishing the birth of the fathers of the detained within the United States and hence showing the said detained to be the sons of native-born citizens thereof, and which said evidence was of such legal weight and sufficiency tht it was an abuse of discretion on the part of the said Commissioner and the said Secretary to deny the said detained the right to admission into the United States and instead thereof to refuse to be guided by said evidence, and the said adverse action of the said Commissioner and the said Secretary was, your petitioner alleges upon his information and belief, arrived at and was done in denying the said detained the fair hearing and consideration of their cases to which they were entitled. Said action was done in excess of the discretion committed to the said Sec-

retary and to the said Commissioner of Immigration. And your petitioner further alleges upon his information and belief, that the said action of the said Secretary and the said Commissioner was influenced against the said detained and against their witnesses solely because of their being of the Chinese race.

That your petitioner has not in his possession any part or parts of the said proceedings had before the said Commissioner and the said Secretary of Labor for the reason that your petitioner has just received telegraphic advice of the dismissal of the said appeals, and the copy of the said records, formerly in the possession of the attorney for the said detained, is now in the mails en route from Washington, D. C., to San Francisco; and [5] it is for said reason impossible for your petitioner to annex hereto any part or parts of said immigration records; but your petitioner alleges his willingness to incorporate, and have considered as part and parcel of his petition, the said immigration record when the same shall have been received from the Secretary of Labor, at Washington, and shall have it presented to this Court at the hearing to be had hereon.

That it is the intention of the said Commissioner to deport the said detained out of the United States and away from the land of which they are citizens by the SS. "Nanking," sailing from the port of San Francisco on the 11th day of May, 1921, at 1 P. M., and unless this Court intervenes to prevent said deportation the said detained will be deprived of residence within the land of their birth.

That the said detained are in detention as aforesaid and for said reason are unable to verify this said petition upon their own behalf and for said reason petition is verified by your petitioner, but for and as the act of the said detained.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner, commanding and directing him to hold the bodies of the said detained within the jurisdiction of this Court, and to present the bodies of the said detained before this Court at a time and place to be specified in said order, together with the time and cause of their detention, so that the same may be inquired into to the end that said detained may be restored to their liberty and go hence without day.

Dated San Francisco, Calif., May 9th, 1921.

YOUNG FAI,
Petitioner. [6]

GEO. A. McGOWAN,
Attorney for Petitioner, Bank of Italy Building, 550 Montgomery Street, San Francisco, California.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

The undersigned, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof, that the same is true of his own knowledge except as to those matters which are therein stated on his

information and belief, and as to those matters he believes it to be true.

YOUNG FAI.

Subscribed and sworn to before me this 9th day of May, 1921.

[Notary's Seal] THOMAS S. BURNS,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 10, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [7]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,215.

In the Matter of YOUNG YEN and YOUNG SOON (19981/15–6 and 7 Ex. SS. "Nile," 2/21/21), on Habeas Corpus.

Order to Show Cause.

Good cause appearing therefor, and upon reading the verified petition on file herein,—

IT IS HEREBY ORDERED that Edward White, Commissioner of Immigration for the port of San Francisco, appear before this Court on the 14th day of May, 1921, at the hour of 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued as herein prayed for; and that a copy of this order be served upon the said Commissioner.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration as aforesaid, or whoever, acting under the orders of the said Commissioner or the Secretary of Labor, shall have the custody of the said Young Yen and Young Soon, are hereby ordered and directed to retain the said Young Yen and Young Soon within the custody of the said Commissioner of Immigration, and within the jurisdiction of this court until its further order herein.

Dated San Francisco, California, May 10th, 1921.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed May 10, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [8]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,215.

In the Matter of YOUNG YEN and YOUNG SOON, on Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Comes now the respondent, Edward White, Commissioner of Immigration, at the port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioners to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicants are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

FRANK M. SILVA,
United States Attorney.
BEN. F. GEIS,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Jun. 18, 1921. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [9]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,215.

In the Matter of YOUNG YEN and YOUNG SOON, on Habeas Corpus.

(Order Overruling Demurrer.)

GEO. A. McGOWAN, Esq., Attorney for Petitioners.

FRANK M. SILVA, Esq., United States Attorney, and BEN. F. GEIS, Esq., Assistant United States Attorney, Attorneys for Respondent.

ON DEMURRER TO PETITION FOR A WRIT OF HABEAS CORPUS.

The demurrer to the petition for a writ of habeas corpus herein is overruled, and the writ will issue as prayed for returnable on July 2d at 10 o'clock A. M.

June 27th, 1921.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 27, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,215.

In the Matter of YOUNG YEN and YOUNG SOON, on Habeas Corpus.

Writ of Habeas Corpus.

The President of the United States of America, to the Commissioner of Immigration, Port of San Francisco, Calif., Angel Island, California, GREETING:

YOU ARE HEREBY COMMANDED that you have the bodies of the said persons by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said persons shall be called or charged, before the Honorable Maurice T. Dooling, Judge of the United States District Court for the Northern District of California, at the courtroom of said court in the city and county of San Francisco, California, on the 2d day of July, A. D. 1921, at 10 o'clock A. M., to do and receive what shall then and there be considered in the premises.

And have you then and there this writ.

WITNESS, the Honorable MAURICE T. DOOLING, Judge of the said United States District Court, and the seal thereof, at San Francisco, California, in said District, on the 28th day of June, A. D. 1921. [11]

[Seal] W. B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

GEORGE A. McGOWAN,
Attorney for Petitioners.

Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the therein named Commissioner of Immigration, Edward White, by

handing to and leaving a true and correct copy thereof with Commissioner of Immigration, Edward White, personally at S. F., in said District, on the 28th day of June, A. D. 1921.

J. B. HOLOHAN,
U. S. Marshal.
By Chris. Runckle,
Deputy.

[Endorsed]: Filed Jun. 28, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [12]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,215.

In the Matter of YOUNG YEN and YOUNG SOON, on Habeas Corpus.

Return to Writ of Habeas Corpus.

Comes now Edward White, Commissioner of Immigration at the Port of San Francisco, by P. A. Robbins, Immigrant Inspector, and in return to said petition for a writ of habeas corpus, admits, denies and alleges as follows:

I.

Denies that Young Yen and Young Soon, or Young Yen or Young Soon, referred to as the "detained" are, or is either of them, unlawfully imprisoned, detained, confined and restrained, or imprisoned or detained or confined or restrained of

their liberty by Edward White, Commissioner of Immigration for the Port of San Francisco, or by any other person or persons whatever at the Immigration Station at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof, or elsewhere or at all, so imprisoned or detained or confined or restrained; and denies that the imprisonment or detention or confinement or restraint of the said Young Yen and Young Soon, or Young Yen or Young Soon, or either of them are or is illegal. But in this connection alleges the fact to be that the said Young Yen and Young Soon are detained by the Commissioner of Immigration at the Immigration Station at Angel Island for deportation to China pursuant to and under the authority of an order of deportation [13] duly made, given and entered by E. J. Henning, Assistant Secretary of the Department of Labor, Washington, D. C., as appears from Respondent's Exhibits "A," "B," "C," "D," "E" and "F," now on file as a part of the petition herein and which records are hereby referred to and made a part of this record with the same full force and effect as if set out in full herein.

II.

Denies that the hearing and proceedings or hearing or proceedings had herein and the action of the said Commissioner and the action of the said Secretary or the action of the said Commissioner or the action of the said Secretary was and is or was or is, in excess of the authority committed to them by the

said rules and regulations or rules or regulations or by said statutes.

III.

Denies that the denial of the application of the said detained or either of them to enter the United States as the sons of native-born citizens thereof or as the sons of a native-born citizen of the United States, was and is or was or is an abuse of the authority committed to them by the said statutes.

IV.

Denies that the evidence presented before the immigration authorities upon the applications of the said detained or either of them to enter the United States was or is of such a conclusive kind and character or kind or character at all, showing the said detained or either of them to be the sons of native-born citizens or the sons of a native-born citizen of the United States; that it was or is an abuse of discretion on the part of said Commissioner and the [14] said Secretary or the said Commissioner or the said Secretary, or either of them, to deny the said detained or either of them the right to admission into the United States.

V.

Denies that said evidence was or is of such legal weight and sufficiency or weight or sufficiency at all that it was or is an abuse of discretion on the part of the said Commissioner and the said Secretary or the said Commissioner, or the said Secretary, or either of them, to deny the said detained or either of them the right to admission into the United States.

VI.

Denies that said adverse action or any action at all of the said Commissioner and the said Secretary or the said Commissioner or the said Secretary, or either of them, was or is arrived at or was or is done in denying the said detained or either of them the fair hearing and consideration or hearing or consideration of their cases or the case of either of them to which they or either of them were or are entitled.

VII.

Denies that said action or any action at all was or is done in excess of the discretion committed to the said Secretary and to the said Commissioner of Immigration or to the said Secretary or to the said Commissioner of Immigration, or to either of them.

VIII.

Denies that said action or any action at all of the said Secretary and the said Commissioner or the said Secretary or the said Commissioner, or either of them, was or is influenced against the said detained or either of them or [15] against their witnesses or either or any of them, solely or at all because of their or either or any of them being of the Chinese race. And in this connection alleges the fact to be that the said detained were denied admission into the United States by the said Secretary of Labor, for the reason that the right of the said detained to enter the United States as persons exempt from the provisions of the Chinese exclusion laws has not been satisfactorily established. That is to say, that the relationship of father and son

between the said detained and their alleged father, Young Fai, has not been satisfactorily established.

WHEREFORE, respondent prays that the said petition be denied and said detained, Young Yen and Young Soon, be remanded to the custody of respondent for deportation, and for such other and further relief as to this Court seems equitable and just.

FRANK M. SILVA,
United States Attorney.
BEN F. GEIS,
Assistant United States Attorney.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

P. A. Robbins, being first duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service for the Port of San Francisco, and has been especially directed to appear for and represent the respondent, Edward White, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within return to writ of habeas [16] corpus and knows the contents thereof; that of affiant's knowledge the matters set forth in the return to writ of habeas corpus are true, excepting those matters which are stated on information and belief and that as to those matters, he believes it to be true.

P. A. ROBBINS.

Subscribed and sworn to before me this 2d day of July, 1921.

[Seal] C. M. TAYLOR,
Deputy Clerk of the United States District Court, Northern District of California.

[Endorsed]: Filed Jul. 2, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [17]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,215.

In the Matter of YOUNG YEN and YOUNG SOON, on Habeas Corpus.

(Traverse to Return.)

COMES now the petitioner herein and traversing the return of the respondent, does hereby deny and admit as follows:

FIRST. Petitioner denies each and every, all and singular, the allegations contained in the petition for a writ of habeas corpus on file herein.

SECOND. Petitioner denies each and every, all and singular, the allegations contained in said return which are contrary to, or at variance with, or in denial of, any of the allegations contained in said petition.

WHEREFORE petitioner prays that the writ of habeas corpus be made permanent and the said wife and child discharged from custody.

YOUNG FAI,
Petitioner.

Dated at San Francisco, California, June 30th, 1921.

GEO. A. McGOWAN,
Attorney for Petitioner, 550 Montgomery Street, San Francisco, California. [18]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Young Tai, being first duly sworn, deposes and says:

That he is the petitioner named and referred to in and who subscribed to the foregoing petition; that the same has been read and explained to him and that he knows the contents thereof; and that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

YOUNG FAI,
Petitioner.

Subscribed and sworn to before me this 1st day of July, 1921.

[Seal of the Notary] THOMAS S. BURNS,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 2, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [19]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,215.

In the Matter of YOUNG YEN and YOUNG SOON, on Habeas Corpus.

Order of Discharge.

This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court now here ORDERED that the said named persons in whose behalf the writ of habeas corpus was sued out are illegally restrained of their liberty, as alleged in the petition herein, and that they be and they are hereby discharged from the custody from which they have been produced, and that they go hence without day.

Entered this 2d day of July, 1921.

[Seal] WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: Filed Jul. 2d, 1921. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [20]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,215.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellant,

vs.

YOUNG YEN and YOUNG SOON,

Appellees.

Notice of Appeal.

To the Clerk of the Above-entitled Court, to Young Yen, and Young Soon and to George A. McGowan, Their Attorney.

You and each of you will please notice that Edward White, Commissioner of Immigration at the Port of San Francisco, appellant herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from an order and judgment made, given and entered herein on the 2d day of July, 1921, setting aside the return to the petition for a writ of habeas corpus, and discharging the said Young Yen and Young Soon from the custody of the said Edward White, Commissioner of Immigration at the Port of San Francisco, and appellees herein.

Dated this 25 day of July, 1921.

FRANK M. SILVA,
United States Attorney,
BEN F. GEIS,
Assistant United States Attorney,
Attorneys for Appellant.

Receipt of service and copy of the within notice of appeal is acknowledged this 25th day of July, 1921.

GEO. A. McGOWAN,
Attorney for Appellees. [21]

[Endorsed]: Filed Jul. 25, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [22]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,215.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellant,

vs.

YOUNG YEN and YOUNG SOON,
Appellees.

Petition for Appeal.

To the Honorable F. H. RUDKIN, Judge of the District Court of the United States for the Northern District of California.

Edward White, as Commissioner of Immigration

at the Port of San Francisco, appellant herein, feeling aggrieved by the order and judgment made, given and entered in the above-entitled cause on the 2d day of July, 1921, discharging Young Yen and Young Soon from the custody of said appellant, does hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith.

WHEREFORE, petitioner prays that his appeal be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings and documents, and all of the papers upon which said order and judgment were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of said Court and in accordance with the law in such case made and provided. [23]

Dated this 25 day of July, 1921.

FRANK M. SILVA,
United States Attorney,
BEN F. GEIS,
Asst. United States Attorney.

Receipt of service and copy of the within petition for appeal is acknowledged this 25th day of July, 1921.

GEO. A. McGOWAN,
Attorney for Appellees.

[Endorsed]: Filed Jul. 25, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [24]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,215.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellant,

vs.

YOUNG YEN and YOUNG SOON,

Appellees.

Assignment of Errors.

Comes now Edward White, Commissioner of Immigration at the Port of San Francisco, respondent in the above-entitled cause, and appellant in the appeal to the United States Circuit Court of Appeals for the Ninth Circuit, taken herein by his attorneys, Frank M. Silva, United States Attorney, and Ben F. Geis, Assistant United States Attorney, and files the following assignment of errors upon which he will rely in the prosecution of his appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment made by this Honorable Court on the 2d day of July, 1921.

I.

That the Court erred in granting the writ of habeas corpus and discharging the said Young Yen and Young Soon from the custody of Edward

White, Commissioner of Immigration at the Port of San Francisco.

II.

That the Court erred in holding that it had jurisdiction to issue the writ of habeas corpus in the above-entitled cause as prayed for in the petition on behalf of said Young Yen and Young Soon for a writ of habeas corpus. [25]

III.

That the Court erred in holding that the allegations set forth in the petition for writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus.

IV.

That the Court erred in finding that the evidence upon which the Secretary of Labor issued the order of deportation for the said Young Yen and Young Soon was insufficient in character.

V.

That the Court erred in holding that Young Yen and Young Soon, or either of them, was or is unlawfully imprisoned, detained, confined and restrained of his liberty by Edward White, Commissioner of Immigration at the Port of San Francisco.

VI.

That the Court erred in holding that the evidence taken at the hearings accorded the said Young Yen and Young Soon before the immigration officials was insufficient to justify the said respondent Edward White to hold, detain or deport the said Young Yen and Young Soon.

VII.

That the Court erred in determining as a question of fact that Young Yen and Young Soon were or was either of them sons of Young Fai as against the decision of the Board of Special Inquiry and the Secretary of Labor that the said Young Yen and Young Soon were not nor was either of them sons of Young Fai.

VIII.

That the Court erred in determining as a question of [26] fact that Young Fai was or is the father of Young Yen and Young Soon or either of them as against the decision of the Board of Special Inquiry and the Secretary of Labor that the said Young Fai was or is not the father of said Young Yen and Young Soon or either of them.

IX.

That the Court erred in holding that Young Yen and Young Soon were citizens of the United States and as such citizens entitled to enter the United States.

X.

That the Court erred in determining as a question of fact that said Young Yen and Young Soon were citizens of the United States as against the decision of the Board of Special Inquiry and the Secretary of Labor that the said Young Yen and Young Soon were not citizens of the United States.

XI.

That the Court erred in holding there was not sufficient evidence that said Young Yen and Young Soon were not citizens of the United States.

XII.

That the Court erred in holding that there was an abuse of discretion on the part of the Board of Special Inquiry and the Secretary of Labor in denying the said Young Yen and Young Soon the right to enter the United States.

XIII.

That the Court erred in holding that the hearing or hearings accorded the said Young Yen and Young Soon by the immigration officials was or were unfair.

WHEREFORE, appellant prays that the said order and judgment of the United States District Court, for the Northern District of California, made and entered herein, in the [27] office of the clerk of said court, on the said 2d day of July, 1921, setting aside the return to the petition for a writ of habeas corpus, and discharging the said Young Yen and Young Soon from the custody of Edward White, Commissioner of Immigration, be reversed, and that the said Young Yen and Young Soon be remanded to the custody of said Commissioner of Immigration.

Dated this 25th day of July, 1921.

FRANK M. SILVA,
United States Attorney,
BEN F. GEIS,
Assistant United States Attorney,
Attorneys for Appellant.

Receipt of service and copy of the within assign-

ment of errors is acknowledged this 25th day of July, 1921.

GEO. A. McGOWAN,
Attorney for Appellees.

[Endorsed]: Filed Jul. 25, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [28]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,215.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellant,

vs.

YOUNG YEN and YOUNG SOON,
Appellees.

Order Allowing Appeal.

On motion of Frank M. Silva, United States Attorney, and Ben F. Geis, Assistant United States Attorney, attorneys for appellant in the above-entitled cause,—

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment of July 2, 1921, heretofore made and entered herein, be, and the same is hereby allowed, and that a certified transcript of the records, testimony, exhibits, stipulations and all proceedings be forthwith trans-

mitted to the said United States Circuit Court of Appeals for the Ninth Circuit, in the manner and time prescribed by law.

Dated this 25th day of July, 1921.

FRANK H. RUDKIN,
Judge of the District Court.

Receipt of service and copy of the within order allowing appeal in acknowledged this 25 day of July 1921.

GEO. A. McGOWAN,
Attorney for Appellees.

[Endorsed]: Filed Jul. 25, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [29]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,215.

In the Matter of YOUNG YEN and YOUNG SOON on Habeas Corpus.

Stipulation (Re Exhibits).

It is hereby stipulated and agreed by and between the respective parties in the above-entitled cause that the records of the Immigration Service, which were filed in the above-entitled court as Respondent's Exhibit "A," "B," "C," "D," "E" and "F," and which were made a part of respondent's return to the petition for a writ of habeas corpus in said cause, may be transferred, in their original form and

without being transcribed or copied, to the United States Circuit Court of Appeals for the Ninth Circuit, and the said records of the immigration service are and may there be considered as a part of respondent's return to the said petition for a writ of habeas corpus, and the record in determining this cause on appeal to the said United States Circuit Court of Appeals for the Ninth Circuit, without objection on the part of either of the said respective parties.

Dated this 25th day of July, 1921.

FRANK M. SILVA,
United States Attorney,
BEN F. GEIS,
Assistant United States Attorney,
Attorneys for Appellant.
GEO. A. McGOWAN,
Attorney for Petitioners. [30]

Receipt of service and copy of within stipulation is acknowledged this 25th day of July, 1921.

GEO. A. McGOWAN,
Attorney for Appellees.

[Endorsed]: Filed Jul. 25, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [31]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,215.

In the Matter of YOUNG YEN and YOUNG SOON on Habeas Corpus.

Order Transmitting Original Exhibits to Appellate Court.

It appearing to the Court that it is both necessary and proper that the records of the Immigration Service referred to in the above stipulation should be inspected in the United States Circuit Court of Appeals for the Ninth Circuit, in determining the appeal of the said cause the same having been filed and considered as stated in this court,—

IT IS THEREFORE ORDERED that the said records be transferred in their original form by the clerk of this court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to be retained by said clerk until the appeal in the above-entitled cause is properly disposed of, at which time the same are to be returned to the clerk of the above-entitled court.

Dated this 25th day of July 1921.

FRANK H. RUDKIN,
United States District Judge.

Receipt of service and copy of the within order transmitting exhibits to Appellate Court is acknowledged this 25 day of July, 1921.

GEO. A. McGOWAN,
Attorney for Appellees.

[Endorsed]: Filed Jul. 25, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [32]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 32 pages numbered from 1 to 32, inclusive, contain a full, true, and correct transcript of certain records and proceedings, In the Matter of YOUNG YEN and YOUNG SOON, on Habeas Corpus, No. 17,215, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein) and the instructions of the attorneys for respondent and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Eleven Dollars and Sixty-five Cents ($11.65), and that the same will be charged against the United States in my next quarterly account.

Annexed hereto is the original citation on appeal issued herein (page 34).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 13th day of August, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk. [33]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States to YOUNG YEN and YOUNG SOON and to GEORGE A. McGOWAN, Esq., Their Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division thereof, First Division, wherein Edward White, as Commissioner of Immigration at the port of San Francisco, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, United States District Judge for the Northern District of California, this 12th day of August, A. D. 1921.

FRANK H. RUDKIN,
United States District Judge. [34]

[Endorsed]: No. 17,215. United States District Court for the Northern District of California. Edward White, as Commissioner of Immigration, etc.,

Appellant, vs. Young Yen and Young Soon, Appellees. Citation on Appeal. Filed Aug. 13, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Due service and receipt of copy of the within is hereby acknowledged this 12th day of August, 1921.

GEO. A. McGOWAN,
Attorney for Appellees.

[Endorsed]: No. 3751. United States Circuit Court of Appeals for the Ninth Circuit. Edward White, as Commissioner of Immigration at the Port of San Francisco, Appellant, vs. Young Yen and Young Soon, Appellees. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 13, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3751

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellant,

vs.

YOUNG YEN and YOUNG SOON,

Appellees.

APPELLANT'S BRIEF

JOHN T. WILLIAMS,
United States Attorney,

BEN F. GEIS,
Assistant United States Attorney,
Attorneys for Appellant.

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No. 3751

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellant,

vs.

YOUNG YEN and YOUNG SOON,

Appellees.

APPELLANT'S BRIEF

STATEMENT OF FACTS.

Young Yen and Young Soon, the appellees herein, arrived at the Port of San Francisco from China on the S. S. "Nile" February 21, 1921, and thereupon made application to enter the United States as citizens thereof, claiming to be the foreign-born sons of Young Fai, whose status as a citizen of the United States is conceded.

After a hearing before a Board of Special Inquiry, their applications for admission were denied,

and, upon appeal, from said denial to the Secretary of Labor, the decision of the Board was affirmed and the appeal denied.

Thereafter, to wit, May 10, 1921, a petition for writ of habeas corpus was filed in the District Court (T. R. 3), and order to show cause was issued (T. R. 8). A demurrer to said petition was filed June 18, 1921 (T. R. 9), and on June 27, 1921, an order overruling the demurrer and directing the writ to issue, returnable July 2, at 10 o'clock a. m., was made, given and entered (T. R. 11).

Thereafter, to wit, July 2, 1921, a return to the writ was filed (T. R. 13), and on the same date petitioner filed a traverse to said return (T. R. 18). And upon further hearing in the matter, the following order of discharge was made, given and entered:

> "In the Matter of YOUNG YEN and YOUNG SOON, on Habeas Corpus.
>
> ORDER OF DISCHARGE.
>
> "This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court now here ORDERED that the said named persons in whose behalf the writ of habeas corpus was sued out are illegally restrained of their liberty, as alleged in the petition herein, and that they be and they are hereby discharged from the

custody from which they have been produced, and that they go hence without day.

"Entered this 2d day of July, 1921.

"(Seal) WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk."

It is from the above Order of Discharge that this appeal is taken.

ASSIGNMENT OF ERRORS.

Thirteen errors are set forth in the Assignment of Errors filed on behalf of appellant on which this appeal is based. The argument will, however, be confined to the following five points:

First: (XIII) That the Court erred in holding that the hearing or hearings accorded the said Young Yen and Young Soon by the immigration officials was or were unfair.

Second: (XII) That the Court erred in holding that there was an abuse of discretion on the part of the Board of Special Inquiry and the Secretary of Labor in denying the said Young Yen and Young Soon the right to enter the United States.

Third: (VII) That the Court erred in determining as a question of fact that Young Yen and Young Soon were or was either of them sons of Young Fai as against the decision of the Board of Special Inquiry and the Secretary of Labor that

the said Young Yen and Young Soon were not nor was either of them sons of Young Fai.

Fourth: (X) That the Court erred in determining as a question of fact that said Young Yen and Young Soon were citizens of the United States as against the decision of the Board of Special Inquiry and the Secretary of Labor that the said Young Yen and Young Soon were not citizens of the United States.

Fifth: (II) That the Court erred in holding that it had jurisdiction to issue the writ of habeas corpus in the above-entitled cause as prayed for in the petition on behalf of said Young Yen and Young Soon for a writ of habeas corpus.

ARGUMENT.

FIRST POINT.

THAT THE COURT ERRED IN HOLDING THAT THE HEARING OR HEARINGS ACCORDED THE SAID YOUNG YEN AND YOUNG SOON BY THE IMMIGRATION OFFICIALS WAS OR WERE UNFAIR.

DOES AN INSPECTION OF THE RECORDS IN THESE CASES SHOW THAT THE PROCEEDINGS WERE MANIFESTLY UNFAIR?

It is shown by the immigration records on file as exhibits herein that the appellees Young Yen and Young Soon arrived at the Port of San Francisco, California, on the S. S. "Nile" February 21,

1921. (Ex. A, pp. 41, 42), and thereupon made applications to enter the United States as citizens thereof, and presented affidavits of their alleged father, Young Fai, attached to which were their photographs and that of the alleged father (Ex. A, pp. 2, 37). There was also filed the affidavit of the witness Fong Git (Ex. A, pp. 1, 36).

Thereafter, to wit, March 7, 1921, the testimony of the alleged father, Young Fai (Ex. A, p. 18), the witness Fong Gat (Ex. A, p. 14), the applicant Young Soon (Ex. A, p. 13), and the applicant Young Yen (Ex. A, p. 9), was taken in shorthand and transcribed in typewriting and made a part of the immigration record.

Thereafter, to wit, March 15, 1921, additional testimony of the alleged father, Young Fai, the applicant Young Soon No. 15-7, (Ex. A, p. 26) and the applicant Young Yen (Ex. A, p. 24) was taken before a Board of Special Inquiry, at which time the testimony theretofore taken and transcribed was introduced and considered by said Board and made a part of the Board's record (Ex. A, p. 22).

Said Board, not being satisfied "that the relationship claimed has been satisfactorily established", voted that action be deferred and ten days be allowed for the production of additional evidence (Ex. A, p. 22.)

Thereafter, to wit, March 16, 1921, the attorney of record was notified in writing of the Board's action

and allowed ten days for the submission of further evidence (Ex. A, p. 27).

Thereafter, to wit, March 17, 1921, the attorney of record advised the Commissioner of Immigration in writing that he had no additional evidence to submit, and requested "that final action be taken at once." (Ex. A, p. 28).

Thereafter, to wit, March 24, 1921, the Board of Special Inquiry voted that the applicants Young Yen and Young Soon be denied admission to the United States, and said applicants were so notified and advised of their right of appeal to the Secretary of Labor. (Ex. A, pp. 30-a, 30, 29.)

Thereafter, to wit, March 25, 1921, the attorney of record and the Consul General for China were notified in writing that the applications of the said Young Yen and Young Soon to land had been denied. (Ex. A, pp. 31, 32.)

Thereafter notice of appeal to the Secretary of Labor was filed with the Commissioner of Immigration, March 29, 1921 (Ex. A. p. 33), and on March 30, 1921, the attorney of record was given full opportunity to review the entire records in the cases, including exhibits, as appears from his receipt therefore. (Ex. A, p. 35.)

Thereafter, to wit, April 7, 1921, the entire record, including exhibits, was forwarded to the Secretary of Labor, Washington, D. C., on appeal (Ex. A, p. 43). On the appeal before the Secretary of

Labor, the applicants were represented by Messrs Ralston and Hott, attorneys at law, who filed a brief on their behalf (Ex. A, p. 46).

After a careful review of all the evidence, a summary of which is set forth in the record, the Secretary of Labor dismissed the appeal. (Ex. A, p. 48.)

We believe that an inspection of the immigration records in this case will show that the applicants were given full, fair and impartial hearings; that they were afforded an opportunity to present all available witnesses, and that all witnesses so presented were fully and fairly heard.

The petition herein does not show nor does an inspection of the immigration record disclose wherein petitioners were denied any substantial right to which they were entitled either under the laws or the rules and regulations in such cases made and provided. It is now well settled that in the absence of such a showing the petition should be denied.

Chin Yow v. *United States,* 208 U. S.

In this case the Court said:

> "If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. These facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts open

> the merits of the case, whether those facts are proved or not. And by the way of caution, we may add, that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contary or impeaching testimony was adduced."

And in the more recent decision of this Court in the case of *Jeung Bock Hon v. White,* 258 Fed. 23, the Court, speaking through His Honor Morrow, C. J., held as follows:

> "We cannot say that the proceedings were manifestly unfair or that the actions of the executive officers were such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In such cases, the order of the executive officers within the authority of the statute is final."

SECOND POINT.

THAT THE COURT ERRED IN HOLDING THAT THERE WAS AN ABUSE OF DISCRETION ON THE PART OF THE BOARD OF SPECIAL INQUIRY AND THE SECRETARY OF LABOR IN DENYING THE SAID YOUNG YEN AND YOUNG SOON THE RIGHT TO ENTER THE UNITED STATES.

DOES AN INSPECTION OF THE IMMIGRATION RECORDS HEREIN DISCLOSE A MANIFEST ABUSE OF DISCRETION?

The reasons assigned by the Secretary of Labor for dismissing the appeal are set forth in the memorandum approved by him on page 49 of Exhibit A and are summarized in the closing paragraph, as follows:

> "The 1897 testimony of the alleged father is not satisfactorily explained by anything appearing in this record, or in the records of prior proceedings. In view of this unfavorable prior testimony which is not overcome by the affirmative showing made in behalf of the present applicants, it is not believed that the right of the latter to enter the United States as persons exempt from the provisions of the Chinese Exclusion Laws has been satisfactorily established. It is accordingly recommended that the appeal be dismissed.
>
> Alfred Hampton,
> Assistant Commissioner General.
>
> So ordered:
>
> E. J. Henning,
> Assistant Secretary."

The immigration records in this case show that Young Fai, the alleged father of the applicants, returned from a visit to China on the S. S. "Doric" April 28, 1897, and was admitted as a citizen of the United States May 13, 1897, by the Collector of Customs (Ex. B, p. 16). His examination at that time was short and will be found on the reverse side of page 16 of Exhibit B. He testified in part as follows:

Q. When did you see your uncle last?

A. A little over a year ago. Yes, in China.

Q. How long did he stay there?

A. My uncle went home to China QS 18 YR (1892). *I am not married. I have no brothers or sisters.*

Corroboration of the fact that he was not married at that time is found in the affidavit of Young Dong, one of his witnesses, who testified "that in the year 1892 he (I) went to China on a business and pleasure trip and returned to the United States in 1895, and that while he (I) was in China he (I) lived in the same village with the said Young Fai, his father and mother, and *saw him frequently and talked and went around with them.* (Exhibit B p. 12.)

If Young Fai was married at that time (he now claiming to have been married in 1893), it seems remarkable that this witness did not mention having seen Young Fai's wife in China, as he claims to have been well acquainted with Young Fai, his father and mother, and to have seen them and to have gone around with them frequently. The fact that he does not mention Young Fai's wife raises a strong presumption that Young Fai was not married at that time, and this presumption has not been overcome by anything appearing in the records.

On March 17, 1909, Young Fai appeared as a witness for an alleged son Young Nin, at which

time he testified he was married KS 19-9-20, which according to American reckoning, would be October 29, 1893. (Ex. C, p. 8). In the present case he testified that he was married in KS 19-1-16, which would be March 4, 1893, according to American reckoning. (Ex. A, p. 18.)

We have, therefore, three different statements regarding his marriage.

First—his testimony of 1897 that *"I am not married."*

Second—his testimony of March 17, 1909, that he was married "KS 19-9-20 (October 29, 1893)."

Third—his testimony of March 7, 1921, that he was married "KS 19-1-16 (March 4, 1893)."

Although he claims on two occasions to have been married in 1893, he gives a different month and day each time, first October 29 and then March 4, a difference of nearly eight months, as the date on which his marriage took place.

The record clearly discloses substantial conflict in the testimony of Young Fai as to the fact of his marriage. His testimony that he was married in 1893, as testified to in the present cases and in 1909, is no stronger or more entitled to credence than his testimony in 1897 that he was not married.

No motive has been assigned why Young Fai should testify to other than the truth in 1897. It is easy, however, to find a motive for his claiming

in his later testimony that he was married, for on those occasions he was attempting to bring his alleged sons into the United States, and, in order to accomplish this result it became necessary that he claim a wife and family in China.

These discrepancies and contradictions are, in respect to facts of time, place and relationship concerning which the witness cannot be presumed to be mistaken, and which appear to have been deliberately, knowingly and falsely made with intent to deceive. No reasonable or satisfactory explanation has been offered, although ample oportunity was afforded each witness to make such explanation, as it appears from the record that each was asked at the close of his examination, "Have you any further statement to make?" to which each replied "No."

In such a case as this we believe that the rule "*falsus in uno, falsus in omnibus*" should be applied.

In the case of *The Santissima Trinidad and The St. Ander* (7 Wheat. 283; 5 L. ed. 454-468), the United States Supreme Court, speaking through His Honor, Justice Story, says:

> "It has been said that if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony. That position may be true under circumstances; but it is a doctrine which can be received only

under many qualifications, and with great caution. If the circumstances respecting which the testimony is discordant be immaterial, and of such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, rather than from deliberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply, the maxim *'falsus in uno, falsus in omnibus.'* What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood? The contradictions in the testimony of the witnesses of the libelants have been exposed at the bar with great force and accuracy; and they are so numerous that, in ordinary cases no court of justice could venture to rely on it without danger of being betrayed into the grossest errors.''

Citizenship is a priceless heritage which is not to be bestowed upon one seeking to enter the United States for the first time without some competent and convincing proof of that fact. Something more

than a mere declaration of citizenship should be required. Were the Board of Special Inquiry, and the Secretary of Labor compelled to accept such testimony as being satisfactory? Is the evidence so positive or clear as to carry conviction to an unprejudiced mind? Does it not bear the earmarks of suspicion as to its truth? These questions are best answered by the opinion of this Court in the case of *Lee Sing Far v. United States,* 94 Fed. 834, wherein the Court, speaking through His Honor Hawley, District Judge, pages 836 and 837, says:

> "The question which we are called upon to decide is not whether there was any evidence tending to establish the fact that appellant was born in the United States, but is whether the evidence is so clear and satisfactory upon that point as to authorize this court to say that the court erred in refusing her to land, and in entering judgment that she be remanded. From the testimony it appears that appellant is of Chinese parentage. She has been in China, with her mother, for 17 years. In such a case it cannot be said that any presumption arises that she was born in the United States. It, therefore, devolves upon her to prove to the satisfaction of the court that she was born in this country. It does not necessarily follow that, because four witnesses have testified positively that she was born in San Francisco, there being no witnes to the contrary, their statements upon this question must be accepted as true. If such a rule were adopted and followed, there would be no more Chinese remanded in such

cases. It is safe to say that the United States is powerless to make any proof in any case as to the place of birth of Chinese children. In the very nature of the case it would, as a general rule, be impossible to do so. The only protection to the government, in the enforcement of the exclusion act in this character of cases, lies in the cross-examination of each witness, on behalf of the petitioner, whereby the 'crucial test' of his credibility may be applied. It may or may not always be successful; but it has often been said to be one of the most efficacious tests which the law has devised for the discovery of truth.

"If, from the whole testimony, the court is not satisfied that the witnesses have told the truth, it has the right to exclude their testimony, and remand the petitioner, because the evidence offered is insufficient to convince the mind of the court that the petitioner is entitled to land in the United States."

In *Quock Ting v. U. S.*, 140 U. S. 417, 420; 11 Sup. Ct. 733, 851, the Court said:

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his ac-

count of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

Because of the character of the evidence and the contradictions and discrepancies therein, the Board of Special Inquiry and the Secretary of Labor were called upon to exercise a discretion in the determination of the matter before them. In the exercise of this discretion they could have decided either in favor of or against the applicants, and there being some evidence in support of that decision, their reasons for so doing would not be subject to judicial review by the Court.

Abuse Justifying Interference.

"The 'abuse of discretion,' to justify interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 Ind. A 395; 62 N.E. 107-111." 1 C. J., 372.

"The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. Abuse of discretion and especially gross and palpable abuse of discretion, which are terms ordinarily employed to justify an interference with the exercise of dis-

cretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 N. Y. 418, 431." 1 C. J., 372.

"Difference in judicial opinion is not synonymous with abuse of judicial discretion. 62 N. J. L. 380, 383." 1 C. J., 372.

This Court, speaking through His Honor, Morrow, C. J., in *White v. Gregory,* 213 Fed. 768, 770, says:

"In reaching this conclusion the officers gave the aliens the hearing provided by the statute. This is as far as the Court can go in examining such proceedings. It will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusions reached by the officers."

In the recent case of *Jeung Bock Hong and Jeung Bock Ning v. White,* 258 Fed. 23, the Court, speaking through His Honor Morrow, C. J., said:

"The discrepancies in the testimony appear to be unimportant but if taking them altogether the executive officers of the Department found that the evidence in support of the petitioner's right to land and enter the United States was so impaired as to render it unsatisfactory, the Court is not authorized to reverse that conclusion."

"We cannot say that the proceedings were manifestly unfair or that the actions of the executive officers were such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by

the statute. In such cases, the order of the executive officers within the authority of the statute is final."

THIRD POINT.

THAT THE COURT ERRED IN DETERMINING AS A QUESTION OF FACT THAT YOUNG YEN AND YOUNG SOON WERE OR WAS, EITHER OF THEM, SONS OF YOUNG FAI AS AGAINST THE DECISION OF THE BOARD OF SPECIAL INQUIRY AND THE SECRETARY OF LABOR THAT THE SAID YOUNG YEN AND YOUNG SOON WERE NOT NOR WAS EITHER OF THEM SONS OF YOUNG FAI.

FOURTH POINT.

THAT THE COURT ERRED IN DETERMINING AS A QUESTION OF FACT THAT SAID YOUNG YEN AND YOUNG SOON WERE CITIZENS OF THE UNITED STATES AS AGAINST THE DECISION OF THE BOARD OF SPECIAL INQUIRY AND THE SECRETARY OF LABOR THAT THE SAID YOUNG YEN AND YOUNG SOON WERE NOT CITIZENS OF THE UNITED STATES.

The General Appropriation Act of August 18, 1894 (28 Stat. L. 390), provides as follows:

> "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter

made the decision of the appropriate immigration or custom officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Labor."

In the case of *Ekiu v. United States,* 142 U. S. 660, the Court says:

> " * * * in such a case, as in all others in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted."

In *United States v. Ju Toy,* 198 U. S. 253, the Court says:

> "It is established, as we have said, that the Act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed, as well when it is citizenship as when it is domicile and the belonging to the class excepted from the Exclusion Acts."

FIFTH POINT.

THAT THE COURT ERRED IN HOLDING THAT IT HAD JURISDICTION TO ISSUE THE WRIT OF HABEAS CORPUS IN THE ABOVE-ENTITLED CAUSE AS PRAYED FOR IN THE PETITION ON BEHALF OF SAID

YOUNG YEN AND YOUNG SOON FOR A WRIT OF HABEAS CORPUS.

It appears to us that the petition in this case fails to set forth facts sufficient to justify the issuance of the writ of habeas corpus. It is more in the nature of an appeal from the discretion of the Department to the discretion of the Court. In such a case the Supreme Court in the case of *Central Trust Company v. Central Trust Company,* 216 U. S. 251, 262; 54 L. ed. 469, 472, says:

> "The appeal made by the complainant to the Department was really nothing but an appeal to its discretion. Assuming that the Court in some cases has the power to, in effect, review the determination of the Department, we do not think this is an occasion for its exercise. The complainant is really appealing from the discretion of the Department to the discretion of the Court, and the complainant has no clear legal right to obtain the order sought."

In *Low Wah Suey v. Backus,* 225 U. S. 460 (56 L. ed. 1167), the Court, speaking through Mr. Justice Day, says:

> "A series of decisions in this Court has settled that such hearings before executive officers may be made conclusive when fairly conducted. *In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, IT MUST BE SHOWN THAT THE PROCEEDINGS WERE MANIFESTLY UNFAIR, THAT THE ACTION OF THE EXECUTIVE OFFICERS WAS SUCH AS*

TO PREVENT A FAIR INVESTIGATION, OR THAT THERE WAS A MANIFEST ABUSE OF THE DISCRETION COMMITTED TO THEM BY THE STATUTE." In other cases the order of the executive officers within the authority of the statute is final. U. S. v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 225 Sup. Ct. Rep. 644; Chin Yow v. U. S., 208 U. S., 8 L. ed. 369, 28 Sup. Ct."

After a careful review of all the records in this case, we are firmly of the opinion that the petition should be denied. We do not believe that an inspection of the record will show that the hearings were manifestly unfair or that there was a manifest abuse of discretion on the part of the Secretary of Labor in dismissing the appeal in this case.

Respectfully submitted,

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No. 3751

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BRIEF FOR APPELLEES.

GEO. A. McGOWAN,
Attorney for Appellees.

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BRIEF FOR APPELLEES.

These two appellees sought to enter the United States as citizens thereof, they being the foreign born sons of a native born citizen of the United States. In support of their applications to enter this country they presented the testimony of their father and identifying witness, and their own testimony, which was all corroborated by the existence of departure and arrival records in the Immigration service showing the father was in China at a time necessary for him to become the parent of these appellees, and also verified the different trips of the father and the witness showing them to have been in

China at the time stated and making it possible to have seen and be able to identify them. The testimony as presented was singularly clear and free from discrepancies. The examining inspector, in his abstract of record and report, notes "some resemblance between applicant Young Soon and his father, but none between the applicant Young Yen and the father". He further states that the demeanor of all witnesses during the examination was satisfactory.

The reason for the adverse finding was the fact that it is claimed that the father made a statement in 1897 that he was not married, which contradicts the statement made in the present case. The father made a visit to China after 1897, and these two appellees were both born years after the alleged statement that the father was not married is claimed to have been made. When the father returned to the United States from the visit to China upon which these two appellees were begotten he was not asked by the Immigration authorities whether he was married; he was refused a landing and his case was thereafter taken into the United States District Court where, after due and proper hearing, he was found to be a citizen of the United States, and was readmitted into the United States as such.

While it is true that upon the father's return from China upon this, the essential trip with respect to the paternity of these appellees, he was not asked whether or not he was married he was, however,

asked his name, and it appears that he gave two names, one of which is his milk, or baby, name, and the other of which is his marriage name, thus indicating that he was married, even though the exact question was not asked him. It is to be remembered that among the Chinese they have a clearly defined system of names; upon the birth of the child he is given his babyhood, or milk name, and upon his marriage he is given his marriage name. Thus it is when a Chinese person is asked his names, if he gives two names, it shows that he is a married person, he having given his milk, or baby name, and his marriage name.

The order of denial before the local Immigration office was appealed from to the Secretary of Labor and there the excluding decision was affirmed. Both the denial by the port officials and the denial by the Department at Washington were predicated solely and exclusively upon the supposed prior declaration of the father in 1897, when he returned to this country, when it appears that he stated that he was not married.

It was successfully urged in the court below upon behalf of these appellees that the testimony and evidence presented before the Immigration authorities was of such a conclusive kind and character that to disregard the same was an abuse of official discretion. Accordingly the demurrer of the Commissioner was overruled and the writ was directed to issue, and upon the hearing of the return thereto

the court found in favor of the appellees and discharged them from custody as citizens of the United States. From this order the Government has perfected this appeal.

Argument.

The appellant has made a number of assignment of errors and seeks to divide this case into a number of different questions. As to the appellees it is felt that the case involves but one question, and that is whether or not the evidence was of such a conclusive kind and character as to constitute an official abuse of discretion in refusing to be guided by it. That was the view taken and urged by the then petitioners before the lower court and was the point sustained by the lower court in deciding these cases in their favor, and in the view of appellees the only point presented for determination before this court.

The latest announcement of the law upon this point is contained in the recent decision by the Supreme Court of the United States in the case of *Kwock Jan Fat v. White* (40 S. Ct. R. 566), wherein on pages 567 and 568 it is held as follows:

> "(2) It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were 'manifestly unfair', were 'such as to prevent a fair investigation', or show 'manifest abuse' of the discretion committed to the executive officers by the statute, Low Wah Suey v. Backus, supra, or that 'their authority was not

fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law,' Tang Tun v. Edsell, Chinese Inspector, 223 U. S. 673, 681, 682, 32 Sup. Ct. 359, 363 (56 L. Ed. 606). The decision must be after a hearing in good faith, however summary, Chin Yow v. United States, 208 U. S. 8, 12, 28; Sup. Ct. 201, 52 L. Ed. 369, and it must find adequate support in the evidence, Zakonaite v. Wolf, 226 U. S. 272, 274, 33 Sup. Ct. 31, 57 L. Ed. 218."

Whereas the court further states on page 570, as follows:

"(4) The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

The foregoing decision was before Judge Dooling and considered by him in this case, as indeed it was

in another case recently decided, wherein the prior declaration as to whether the father was single or married was involved, the case being that of *Tam You Lin,* No. 17295, and the records of the lower court wherein it was held by the lower court:

> "The arguments addressed to the court as to the effect of the alleged father's prior declarations that he was not married, might well be and indeed were addressed to the Immigration Department. Notwithstanding such arguments the Department ruled against the petitioner on the facts. Such ruling, in the absence of every exceptional circumstance, binds the court."

In the case of the said *Tam You Lin* the court did not find the exceptional circumstances which it felt would give the lower court jurisdiction, whereas in the present case the court did find "those very exceptional circumstances" which the lower court felt gave it jurisdiction in the premises and resulted in the order of discharge now being considered.

Now in the present case the said decision in the *Kwock Jan Fat* case is doubly applicable. By referring to the record in the present case it is frankly admitted and conceded by the government that, save for one circumstance, the evidence is legally of such a character that to disregard it would be an abuse of official discretion and render the hearing before the Immigration Service unfair, and hence give this court jurisdiction to proceed and determine the case upon its merits.

The one circumstance hereinbefore adverted to is the fact that when the father, Young Fai, reentered

the United States as incoming passenger No. 58, ex SS. "Doric", during the month of April, 1897, he was subjected to what appears to have been a very short examination. The imperfection in the method of reporting this examination is most apparent; in fact, the applicant does not even seem to have been asked his name. The heading of his examination sheet shows his name, class and place of birth, which presumably was taken from the manifest. Whether the applicant had any other names was not asked of him. There were but seven questions in this examination and the last question and answer alleged to have been given by him is as follows:

> "Q. How long did he stay there?
> A. My uncle went home to China Q. S. 18 (1892). *I am not married.* I have no brothers or sisters."

It will be noted that the question addressed to the father referred to his uncle, and the first part of his answer refers to his uncle, while the last two parts seem to refer to the applicant. It is admitted that the last part does refer to the applicant, as he has neither brothers or sisters, but it may well be that the translation "I am not married", had reference to the uncle and not to the applicant. This for the reason that the uncle Young Dong, was apparently single. The father testified on March 7th, 1921, with respect to this uncle that he did not know whether that uncle was married or not. He did know that his uncle, Young Gooey, was married, but Young Dong is the uncle about whom he testified in

1897 when he stated that an uncle went home to China Q. S. 18 (1892). It will be noted that in the present case the father disclaims having stated in 1897 that he was not married. It may well be that that was a mistake in the translation or in the way the unrecorded question was asked of the applicant, so that the applicant's answer, though probably referring to this uncle Young Dong as not being married was recorded as referring to himself. This examination was through the medium of a Chinese interpreter and it may be that the question being addressed about the uncle that the marriage feature of it also referred to the uncle in the mind of the party being questioned, while the interpreter had in his mind the applicant.

According to the present claims of the father he was married when he returned to this country in April, 1897, notwithstanding the declaration that he was not married. The father claims to have been the father of two children older than these present applicants. Those two older sons since came to the United States and tried to land, but were denied admission because of this adverse declaration of the father, which was rigidly held against him as an "estoppel". It is frankly conceded that there was very great and strong merit in the cases of the first set of these two boys, and that there was a very strong resemblance between at least one of them and the father, yet, because of this prior adverse declaration being then regarded as an absolute estoppel,

the appeals were both dismissed and the then applicants returned to China.

These two present applicants are, however, younger brothers, born long after April, 1897, when this declaration was made, and hence in all fairness should not be bound by it. That the Immigration Officers erred in the earlier cases by holding this prior declaration as an absolute estoppel which prevented the father from claiming that he was in fact married at that time is now frankly admitted by the Immigration Service, and such prior declarations are not now considered as an absolute estoppel. The ruling setting forth the prevailing rule of evidence is contained in the decision of the Department in the case of *Chang Wo,* No. 54005/4-1 (No. 14390/11-20) decided September 14, 1915, wherein it was held as follows:

> "This case, like that of Lim Hung Sam, (54004/31) is referred to me by the Acting Secretary (before whom it came originally) because it involves the Department's policy relating to misstatements by alleged fathers at prior examinations. In the present case as in the other case the applicant is confronted with a prior statement of his alleged father, which, if true, makes it impossible for applicant to be a son of the person here claiming to be his father. As I have stated in the Lim Hung Sam case, it is not the policy of the Department to regard these prior statements as estoppels. When, as in both these cases, the father has testified years ago that he was then unmarried, and now testifies to being the father of an applicant born before his prior testimony, he is not precluded from showing that he was in fact married at the time he

swore he was unmarried. While his prior testimony is a fact to be considered in arriving at a conclusion it is not an absolute bar to the admission of his alleged son (53560/116).

"Therefore, if the applicant in this case has shown that his alleged father was married at the time of his father's prior testimony to the contrary, and that their relationship is as asserted, he is entitled to admission. This, I think, he has done.

"Appeal sustained.

Louis F. Post, Asst. Sec'y."

The contention of American born Chinese which caused them to make these former statements which were inconsistent with their later declarations was that during the period of the latter 1890s and the early 1900s, they claimed that there was a well grounded belief in the minds of the Chinese that in the cases of American born Chinese boys who had been living in China, and were seeking to re-enter the United States as citizens thereof, that to admit they were married, and particularly long prior to their return, and that they had a family of foreign born children, would be considered by the Customs or Immigration authorities as circumstances tending to show that they had by so establishing a foreign home and family ties, abandoned their right of residence in the United States, and thus terminated their citizenship. Printed Decision No. 36 of the Department of Commerce and Labor, V. H. Metcalfe, Secretary, dated July 6, 1904, contains in almost its concluding part, what the Chinese have contended was substantially the position of the Cus-

toms and Immigration authorities during the time in question. The extract follows:

> "Without assigning further reasons the Department dismisses the appeal, although it believes that such a case, where a child is born of alien parents already having an offspring in their own home abroad, and leaving shortly after the birth of such child for a permanent residence in their own home, and where the child so born in the United States waits until he is 26 years of age, establishes himself in his own country, marries before he attempts to claim his birthright, is not within the reasoning upon which the Supreme Court reaches its decision in the Wong Kim Ark Case."

The explanation made by American born Chinese with respect to these examples to prior inconsistent testimony has usually taken the line that they believed that if they admitted they were married, and particularly if they admitted they were married long prior to their returning to the United States, and that during the interim they had established a separate residence and raised a numerous family, that such facts and circumstances would be considered as evidence that they had, as a conclusion of law, abandoned their American citizenship by establishing a foreign domicile, and particularly by numerous home ties. These explanations were naturally predicted upon the admission that the former adverse declarations were at the time they were made probably "self-serving". In Assistant Secretary Post's decision in the Chang Wo case, supra, he says, with respect to such matters:

> " * * * As I have stated in the Lim Hung Sam case, it is not the policy of the department to regard these prior statements as estoppels. * * * While his prior testimony is a fact to be considered in arriving at a conclusion, it is not an absolute bar to the admission of his alleged son."

The Supreme Court in the Kwong Jan Fat case has laid down the ruling that it is incumbent upon the immigration officials to maintain a proper record of their hearings. The original statement taken from the father of these boys in April, 1897, cannot be said to measure up to this requirement. It apparently consists of just seven questions, the last one being:

> "Q. How long did you stay there?
> A. My uncle went home to China Q. S. 18 (1892). *I am not married.* I have no brothers or sisters."

It is apparent that this answer is not responsive to the question, that it contains much more than was brought out by the interpreter in answer to a line of questions that have been omitted entirely from the record. That the father was in point of fact married at that time is evidenced by the fact that when he was next examined before the Immigration Office he gives two names, one of which is his "Milk", or baby name, and the other his marriage name.

These two appellees were born as the result of a subsequent trip to China years after the one upon which the detrimental statement in question is

claimed to have been made by the father, and it is certainly felt that it is a wrong value to place upon such a questionable rule of evidence as to still regard this old statement of 1897 as an absolute estoppel which cannot be overcome when the rights of subsequently born children are at stake.

The point made is that such Chinese applicants for admission at that time labored under the belief that to admit that they were married and had children in China would be to work a forfeiture of their American citizenship, and hence, acting under the compulsion of this belief these native born citizens denied the fact that they were married and that they had children when returning to this country. They felt that they were compelled to do this because to admit the truth, that is, that they were married and had a wife and children, would prevent their re-entry. The fact that the father was a married man is indicated that upon the first occasion that he was thereafter questioned by the Immigration authorities it develops that he used both the "Milk" and the "Married" name. There is no contention that he ever married in this country; that he could not have done so without its being a matter of official record and hence capable of proof. The marriage name could only have come from the prior existing marriage.

The Department has in a long, long line of cases, both prior to and since the *Chang Wo* decision hereinbefore referred to, admitted the existence of this erroneous belief in the minds of native born citi-

zens returning to the country of their nativity, and in the present case we feel it was an official abuse of discretion to hold this former statement as a direct estoppel which could not be overcome even in the cases of children born long subsequently thereto.

I am not unmindful of the fact that the father in the present case making the prior declaration that he was not married, but this denial is undoubtedly prompted by the overwhelming consciousness of the fact that he is the father of these two appellees, and he could not bring himself to admit that he had denied the existence of his wife and children. It undoubtedly and unquestionably is the fact that at the time in question the father was laboring under the mistaken belief that to admit the existence of a wife and children would work a forfeiture of his American citizenship, and hence if he did so it was for that reason, he denied their existence.

The Department has for years recognized the former existence of this mistaken idea upon the part of Chinese citizens and quite uniformly made allowance therefore. It is only now that with the change of administration and new officers in charge of these administrative functions they, probably not being familiar with these past circumstances, have taken up these prior declarations and held to them with a rigidity that places them in the class of being an absolute estoppel, thus precluding a fair consideration of the main issue, which is whether or not the father was, in point of fact, married and the father of these appellees, and substituting therefor the col-

lateral issue as to whether or not the father made the prior declaration attributed to him to the effect that he was not married and had no children. Approaching the matter in this view it is felt by counsel, and was felt by the court below that the considerations of this case before the Departmental officers have not been fair. The decision of the Supreme Court in the case of *Kwock Jan Fat*, supra, is of controlling force in this case. That Supreme Court stated in that case:

> " * * * It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

I feel that the general principles therein enunciated should prevail and control in this case.

Dated, San Francisco,
October 22, 1921.

Respectfully submitted,

GEO. A. MCGOWAN,
Attorney for Appellees.

No. 3751

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellant,

vs.

YOUNG YEN and YOUNG SOON,
Appellees.

APPELLEES' PETITION FOR A REHEARING.

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APPELLEES' PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

This court decided in part as follows:

> *"Upon habeas corpus proceedings the court below discharged the appellees. From that judgment the Commissioner of Immigration takes this appeal.*
>
> *"We are unable to see on what ground it can be held that the proceedings before the Board of Special Inquiry were unfair. * * * Young Fai made no explanation of these discrepancies, although he was afforded full opportunity to do so. He denied that he had testified in 1897 that he was not married, but he admitted that*

in all other respects the record of his testimony taken at that time was correct. The discrepancies in Young Fai's testimony as to the dates on which his sons were born may be unimportant, but his contradictory statements as to the fact of his marriage and the date thereof may well have been deemed important by the Board of Special Inquiry, and sufficient to discredit Young Fai's testimony that the appellees were his sons. We cannot say, in view of such statements of Young Fai that the conclusion reached by the board was manifestly unfair. It is not the function of this court in habeas corpus proceedings to weigh the evidence or go into the question of the probative facts. It is sufficient in such a case, if there is some testimony to sustain the conclusion reached. Here there was, we think, substantial ground to discredit the testimony which was adduced on behalf of the applicants."

It is felt that this honorable court, when it held "there is some testimony to sustain the conclusion reached", had in mind the decision of the Supreme Court in the case of Chin Yow v. U. S. (208 U. S. 8), wherein it held as follows:

> "And, by way of caution, we may add that jurisdiction would not be established simply by proving that the commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced.
>
> * * * * * * *
>
> 'But, unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

The Chin Yow decision was rendered on January 6, 1908, and since that time it is contended that very material modifications have been made by the Supreme Court in the stringency of the rules and principles announced and enunciated in that case. In the case of Tang Tun v. Edsell (223 U. S. 673) decided March 11, 1912, or over four years after the Chin Yow case, the question came up as to the power of the court to review the decisions of the Immigration authorities where the conclusiveness of the evidence presented was involved, and in that case the court entertained their legal right so to do, although in the Tang Tun case the evidence was not so conclusive as contended for. The court held:

> "But it is said that the evidence for the applicants was of such an indisputable character that their rejection argues the denial of the fair hearing and consideration of their case to which they were entitled. This contention is not supported."

The next case which arose before the Supreme Court was that of Low Wah Suey v. Backus (225 U. S. 450), which was decided on June 7, 1912. In the Low Wah Suey case emphasis was laid upon the right of the court to review the decision of the immigration authorities in response to the charge that those officials had abused their discretion by deciding against the great mass and weight of evidence, citing the following cases:

The case of *United States v. Chin Len* (187 Fed. 544), decided by the Circuit Court of Appeals, Second Circuit, is a case which takes the view we con-

tend for in this matter. The court, Coxe, C. J., said:

> "The case is much stronger than many of the reported cases where the Chinese persons, seeking entrance, endeavored by the testimony of witnesses to establish their citizenship. In the present case that fact had been judicially determined by the finding of a competent tribunal. The inspector was not justified in arbitrarily disregarding the judgment. He could prove it to be invalid or fraudulently issued, but he could not treat it as a nullity upon mere suspicion and conjecture. He was bound to treat it as valid until its invalidity was established. No relevant question of fact was presented so far as the commissioner's judgment was concerned, or, indeed, upon the question of identity.
>
> "In cases where the relator does not have a fair hearing the writ of habeas corpus is the proper remedy. Chin Yow v. U. S. (208 U. S. 8) * * * and cases cited. We are constrained to hold, therefore, that the hearing before the inspector and the Department of Commerce and Labor were not full, fair and unbiased, and that the decision refusing the relator admission to the United States was not warranted."

The following case presents and upholds the legal jurisdiction that a disregarding of evidence may be of such a character as to constitute what is technically known as an abuse of discretion, although in that particular case itself, it was found, that the abuse did not exist, although the legal principle was recognized. *Ex parte Lee Kow* (161 Fed. 592), Ray, D. J., said:

> "The decision made was neither arbitrary nor unwarranted, and the evidence was not so

> conclusive as to warrant a court in saying that there has been an abuse of power or discretion. Unless the court must say this or is forced to this conclusion by the record, it is its duty to dismiss the writ."

We contend that the immigration officials, acting in a quasi judicial capacity, who obviously have not the learning or the experience of the judiciary, are certainly not more gifted than the men of greater learning, and we therefore contend that the fundamental legal principles are binding upon them. In the case of *Woey Ho v. U. S.* (109 Fed. 888), decided by the Circuit Court of Appeals for the Ninth Circuit, the court said:

> "A court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All people, without regard to their race, color, creed, or country, whether rich or poor, stand equal before the law. It is the duty of the courts to exercise their best judgment, not their will, whim, or caprice, in passing upon the credibility of every witness."

The term "abuse of discretion" is thus denied in Cyc. 1-219:

> "An abuse of discretion is merely a discretion exercised to an end or purpose not justified by and clearly against reason or evidence."

The leading case cited in support of this being *Sharon v. Sharon* (75 Cal. 48), in which the court said:

> "The discretion of the court below is a *legal* discretion, to be reasonably exercised. 'Abuse

> of discretion' in making such orders does not necessarily imply a wilful abuse, or intentional wrong. In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason,—all the circumstances before it being considered."

Directly in line and further explanatory of this principle we find cited in *14 Cyc.,* 383, the case of *Rothrock v. Carr* (55 Ind. 334-5), in which it is decided:

> "The words 'to make allowances at their discretion', mean to make allowances according to law, at their discretion. They do not mean an arbitrary, uncontrolled, unlimited discretion, contrary to law, or without authority of law; for where there is no act to do, and therefore, no discretion, not a personal discretion; for to allow the board a personal discretion would give them the power to make law."

As a result of these and other authorities and the presentation upon this point the court held in *Low Wah Suey v. Backus* (225 U. S. 460):

> "In order to successfully attach by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final."

The next case before the Supreme Court was that of *Zakonaite v. Wolf* (226 U. S. 272), wherein the

Supreme Court states the point made by appellant and their answer thereto as follows:

> "In her behalf it was contended in the court below, and is here contended, first, that there was no evidence before the Secretary of Commerce and Labor sufficient to warrant the findings of fact upon which the order of deportation was based;
> * * * * * * *
> "As to the first point, an examination of the evidence upon which the order of deportation was based convinces us that it was adequate to support the Secretary's conclusion of fact. That being so, and the appellant having had a fair hearing, the findings are not subject to review by the courts."

While the Supreme Court itself in re-reviewing these last cases, which they did in the recent case of *Kwock Jan Fat v. White* (253 U. S. 454), appraised the holding of the different cases as follows:

> "(2) It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were 'manifestly unfair', were 'such as to prevent a fair investigation', or show 'manifest abuse' of the discretion committed to the executive officers by the statute, Low Wah Suey v. Backus, supra, or that 'their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law', Tang Tun v. Edsell, Chinese Inspector (223 U. S. 673, 681, 682; 32 Sup. Ct. 359, 363; 56 L. Ed. 606). The decision must be after a hearing in good faith, however summary, Chin Yow v. United States (208 U. S. 8, 12; 28 Sup. Ct. L. Ed. 369), and it must find ade-

quate support in the evidence, Zakonaite v. Wolf (226 U. S. 272, 274; 33 Sup. Ct. 31; 57 L. Ed. 218)."

From a review of the foregoing authorities it is respectfully submitted that the holding of this court "it is sufficient in such a case if there is some testimony to sustain the conclusion reached", shuts out entirely from judicial considerations the point that the evidence presented upon the holding may yet be of such a conclusive kind and character that to disregard it would be an official abuse of discretion. The court might well see that a condition would arise where there would be "some testimony" to sustain the conclusion reached and yet the "some testimony" in question might be offset by evidence so conclusive in its kind and character that it would be an official abuse of discretion to refuse to be guided by it.

In the present case the reason assigned for the rejection of the testimony is the fact that the father is reported to have volunteered the statement in 1897, "I am not married", when he returned to this country from a temporary visit to China. These two appellees were not born at that time, nor was it claimed that they were begotten as a result of that trip. The father made a subsequent trip to China from which he returned on May 31, 1903, or six years after the time when he was supposed to have made this volunteer statement, and it was as the result of this last mentioned trip that these two appellees were born. The immigration record

in this case is complete and thorough, and covers all matters of family life, and the details of their village in China, and the father and the witness and the two boys were thoroughly and searchingly cross-examined with respect to all of these different matters, and the result was that the weight of this evidence was deemed by Judge Dooling, below, to be of such a conclusive nature and character that to refuse to be guided by it was an official abuse of discretion. The court in its decision apparently limits the right of the trial court to determine whether there was "some testimony" to sustain the department's action, and apparently shuts out what we contend is the greater consideration, and that is whether or not the evidence taken as a whole is of such a conclusive kind and character as to be an abuse of official discretion not to be guided by it. If this larger principle for which we contend is the correct one, and it so seems to us in view of the authorities, we feel that it opens up a larger scope of the question than this honorable court has recognized in its decision handed down herein.

The immigration authorities may assign anything as a ground for the rejection of testimony, no matter how trivial the point may appear to be, and yet it would be some ground to sustain their adverse conclusion, whereas upon the case as a whole the adverse reason urged would be infinitesimal. This is not a point of asking the court to weigh the evidence to see whether the decision was right or wrong in a narrow sense, or whether the court would have

concluded the matter differently were it exercising original jurisdiction over the subject, but it is felt that a just consideration of all the evidence for the purpose of determining whether it is so positive and convincing as to be an abuse of official discretion to disregard it is, we contend, a function of the court, and has been so held by the Supreme Court in the authorities mentioned. That is what we feel was done by Judge Dooling, below, in this case, and after a just consideration of the evidence he felt that notwithstanding there was some evidence to support the department's adverse action, that the clear weight of the evidence was so positive and conclusive that it was an abuse of official discretion for the immigration authorities to refuse to be guided by it.

We feel the general principles enunciated by the Supreme Court in *Kwock Jan Fat,* supra, are pregnant with meaning upon a situation such as is presented here. The court there held at page 570 as follows:

> "(4) The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers

proceed to judgment. For failure to preserve such a record for the information, not less of the Commissioner and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

It is hoped by appellees that the court will respectfully grant their petition for a rehearing.

Dated, San Francisco,
March 15, 1922.

Respectfully submitted,

GEO. A. MCGOWAN,
Attorney for Appellees and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellees and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
March 15, 1922.

GEO. A. MCGOWAN,
Counsel for Appellees and Petitioners.