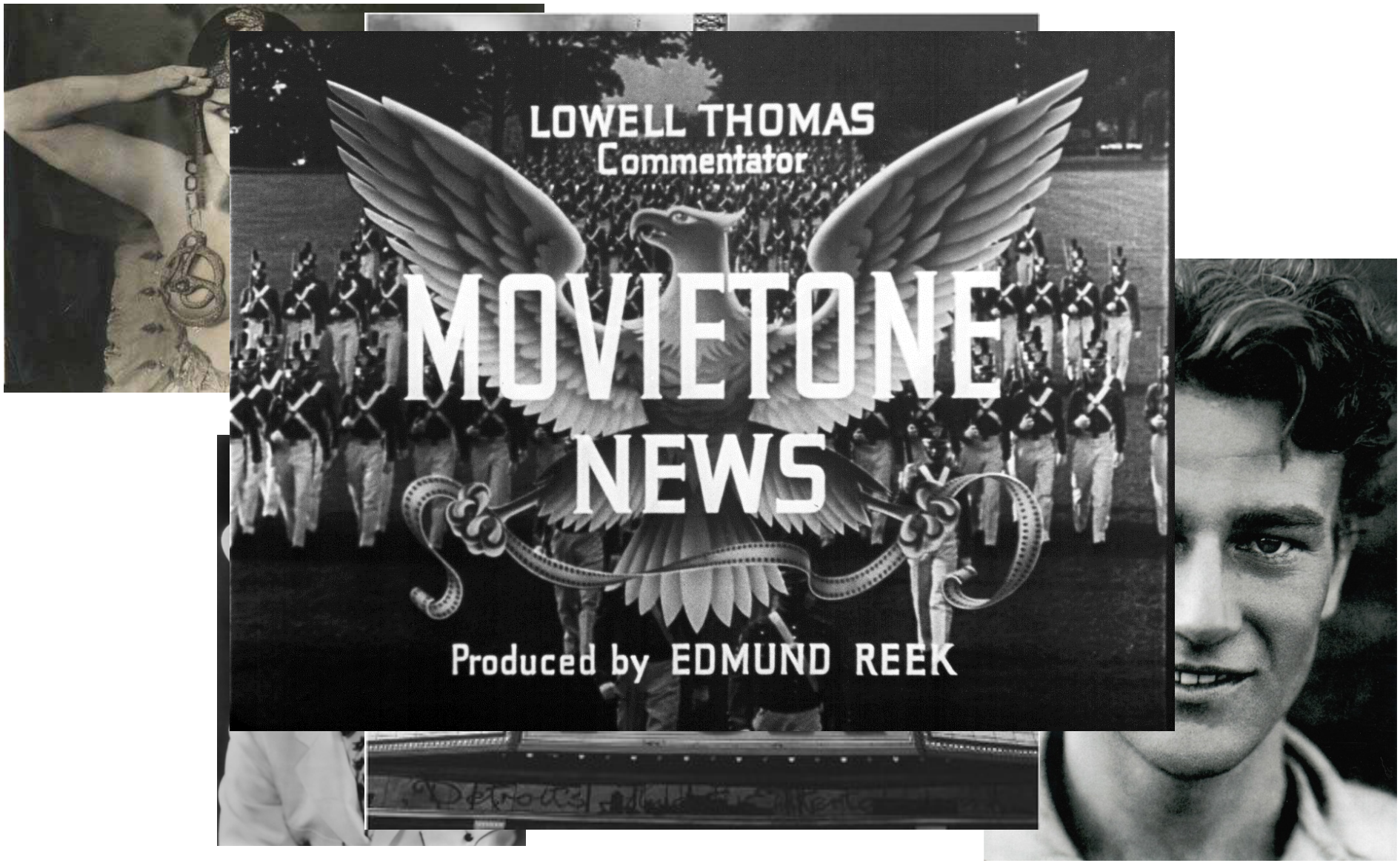
WILLIAM FOX

In re Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 66 S. Ct. 1176, 90 L.Ed. 1447 (1945); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 182 F.Supp. 18 (1960); *Kaufman v. Commissioner of Internal Revenue*, 12 T.C. 1114 (T.C. 1949); *Kaufman v. United States*, 233 F. Supp. 123 (1964); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 182 F.Supp. 18 (1960); *United States v. Manton*, 107 F.2d 834 (2nd Cir. 1939).

Fox Film Corporation



October 29, 1929 - “Black Tuesday”

- “Stock Market Crash Traps Movie Czar in $91,000,000 Debt.”
  - December 6, 1929 Headline
- 1932 – Fox Film Corporation files for bankruptcy
- 1932 – Fox Theatres Corporation put into a receivership
- **1936 – William Fox files personal bankruptcy**

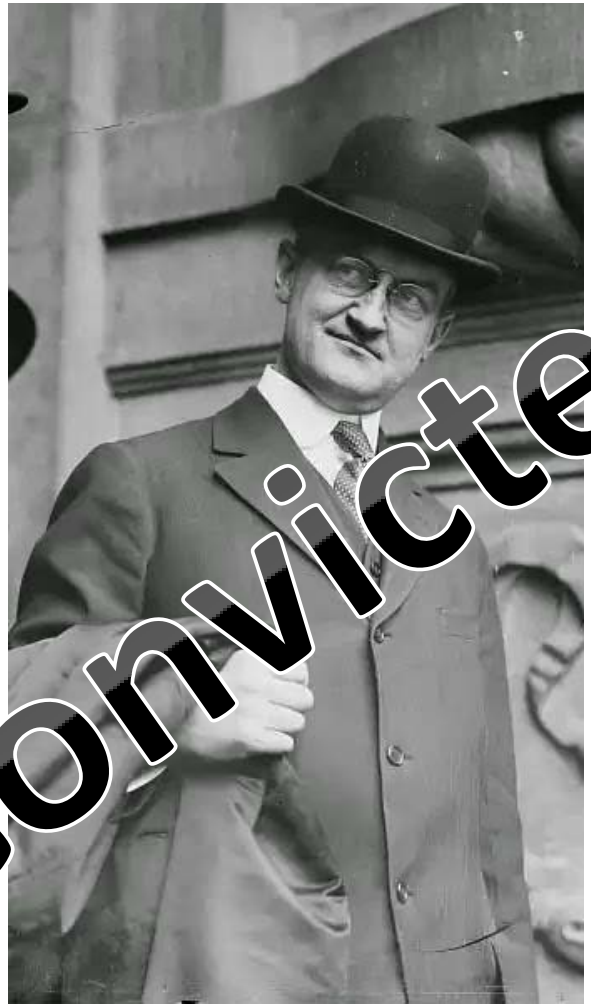
Conspiracy to Obstruct Justice and to Defraud the United States i.e., Bribing the Judge

William Fox

Attorney:
Morgan S. Kaufman

J. Warren Davis
3rd Circuit
Court of Appeals

Fox Theatres Corporation Receivership



J. Martin Thomas Manton

107 F.2d 834
Circuit Court of Appeals, Second Circuit.

UNITED STATES
v.
MANTON et al.

No. 111.
|
Dec. 4, 1939.

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

Martin T. Manton and George M. Spector were convicted on an indictment charging them, together with other persons, with a conspiracy to obstruct the administration of justice and to defraud the United States, and they appeal separately.

Affirmed.

West Headnotes (27)

[1] **Indictment and Information**
Conspiracy

An indictment charging a general conspiracy constituting an agreement between a Circuit Judge and an acquaintance by the terms of which, without a time limit, acquaintance should seek out litigants and parties, known or unknown, who were interested in suits then or thereafter pending and in effect represent to each of them that judge would accept money in return for corrupt judicial action by him favorable to the interests of those who paid, charged a conspiracy to obstruct the administration of justice and to defraud the United States as a single continuing offense, and did not charge a number of distinct offenses. Cr.Code §§ 37, 135, 18 U.S.C.A. §§ 371, 1503.

27 Cases that cite this headnote

[2] **Conspiracy**
Object

A "conspiracy" constitutes an offense irrespective of the number or variety of objects which the conspiracy seeks to attain or whether any of the ultimate objects are attained.

8 Cases that cite this headnote

[3] **Conspiracy**
Overt Act

The offense of "conspiracy" becomes complete when the agreement is made, and the only effect of a statutory requirement that an overt act be shown is to permit an abandonment of the conspiracy in the meantime and the consequent avoidance of the penalty which the statute imposes.

6 Cases that cite this headnote

[4] **Indictment and Information**
Conspiracy

An indictment charging a conspiracy to obstruct the administration of justice in violation of a criminal statute and also to defraud the United States was not bad for duplicity. Cr.Code §§ 37, 135, 18 U.S.C.A. §§ 371, 1503.

16 Cases that cite this headnote

[5] **Courts**
Particular Questions or Subject Matter

The Circuit Court of Appeals was bound by a decision of the United States Supreme Court that

an indictment alleging that a conspiracy contemplated the violation of a criminal statute and also the defrauding of the United States was not bad for duplicity. Cr.Code §§ 37, 135, 18 U.S.C.A. §§ 371, 1503.

1 Cases that cite this headnote

[6] **Conspiracy**
Conspiracy to Defraud Government
Conspiracy
Conspiracy to Obstruct Justice or Impede Administration of Laws

An indictment charging a conspiracy to obstruct justice and to defraud the United States was not bad as charging a conspiracy to accept and secure bribes which is not an indictable conspiracy, where scheme of resorting to bribery was averred only to be a way of consummating the conspiracy as purely ancillary to the substantive offense. Cr.Code §§ 37, 135, 18 U.S.C.A. §§ 371, 1503.

8 Cases that cite this headnote

[7] **Conspiracy**
Circumstantial Evidence

In prosecution for a conspiracy, it is not necessary that the participation of accused should be shown by direct evidence, but connection may be inferred from such facts in evidence as legitimately tend to sustain that inference.

27 Cases that cite this headnote

[8] **Criminal Law**
Construction in Favor of Government, State, or Prosecution
Criminal Law
Particular Offenses and Prosecutions
Criminal Law
Particular Offenses and Prosecutions

In passing on the sufficiency of the proof to connect an accused with a conspiracy to obstruct justice and to defraud the United States, it was not the province of the Circuit Court of Appeals to weigh the evidence or to determine credibility of witnesses, but that court was required to take that view of the evidence most favorable to the government and sustain the jury's verdict of conviction if there was substantial evidence to support it. 18 U.S.C.A. §§ 371, 1503.

38 Cases that cite this headnote

[9] **Conspiracy**
Obstructing Justice, Bribery, and Perjury

Evidence sustained conviction of Circuit Judge for participating in conspiracy to obstruct the administration of justice and to defraud the United States by entering into an agreement with an acquaintance whereby acquaintance should seek out litigants and parties, known or unknown, who were interested in suits then or thereafter pending, and in effect represent to each of them that judge would accept money in return for corrupt judicial action by him favorable to the interests of those who paid. Cr.Code §§ 37, 135, 18 U.S.C.A. §§ 371, 1503.

10 Cases that cite this headnote

[10] **Criminal Law**
Order of Proof

In conspiracy prosecution, objection to testimony concerning statements made by coconspirator in defendant's absence going only to the order of proof was addressed to the discretion of the District Court.

11 Cases that cite this headnote

[11] **Conspiracy**
Issues, Proof, and Variance

In prosecution for conspiring to obstruct the administration of justice and to defraud the United States, testimony in respect of a certain trial before a particular judge was not improperly received on ground that case was in a District Court, whereas indictment related only to proceedings in the Circuit Court of Appeals, where indictment specifically mentioned that particular case as having been duly brought in the United States District Court for the Southern District of New York and included that court and that case by general words of description as being within the purview of the conspiracy. Cr.Code §§ 37, 135, 18 U.S.C.A. §§ 371, 1503.

9 Cases that cite this headnote

[12] **Criminal Law**
Necessity and Admissibility of Best Evidence in Criminal Prosecutions

Photostatic reproductions of the face of checks which had been paid were admissible as "primary evidence" of payment in conspiracy prosecution within statute providing that any writing or record made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible as evidence thereof, if made in the regular course of business. 28 U.S.C.A. § 1732.

10 Cases that cite this headnote

[13] **Criminal Law**
Necessity and Admissibility of Best Evidence in Criminal Prosecutions

The best evidence rule should be so applied as to promote the ends of justice and guard against fraud or imposition, and it should not be pushed beyond the reason on which it rests.

3 Cases that cite this headnote

[14] **Criminal Law**
Necessity and Admissibility of Best Evidence in Criminal Prosecutions

The best evidence rule is not based on the view that so-called secondary evidence is not competent, since, if the best evidence is shown to be unobtainable, secondary evidence at once becomes admissible.

Cases that cite this headnote

[15] **Criminal Law**
Necessity and Admissibility of Best Evidence in Criminal Prosecutions

Where it appears that what is called secondary evidence is clearly equal in probative value to what is called the primary proof and that fraud or imposition reasonably is not to be feared, the reason on which the best evidence rule rests ceases, and the rule itself ceases to be applicable.

3 Cases that cite this headnote

[16] **Criminal Law**
Necessity and Admissibility of Best Evidence in Criminal Prosecutions

So-called original and carbon copies of a document are duplicate originals, and one is as much "primary evidence" as the other.

6 Cases that cite this headnote

[17] **Witnesses**
Scope and Extent of Cross-Examination in General

The office of cross-examination is to test the truth of the statements made by the witness on direct examination, and to that end it may be exerted directly to break down the testimony in chief, to affect the credibility of the witness, or to show intent.

7 Cases that cite this headnote

[18] **Criminal Law**
Cross-Examination
Witnesses
Cross-Examination as to Irrelevant, Collateral, or Immaterial Matters

The extent to which cross-examination on collateral matters shall go is a matter peculiarly within the discretion of the trial judge, and his action will not be interfered with unless there has been a plain abuse of discretion.

17 Cases that cite this headnote

[19] **Conspiracy**
Conspiracy to Obstruct or Pervert Justice or Hinder the Execution of Law

A conspiracy contemplating the payment of money to induce a Circuit Judge to exercise his judicial power in favor of bribe givers without regard to the merits, became complete the instant the conspiracy was formed, whether the object of the conspiracy ever was consummated, or, if consummated, whether the decisions finally rendered in pursuance of the conspiracy were legally sound or not, and hence, in prosecution for conspiracy, District Judge's refusal to charge that jury might consider whether decisions involved were correct, was not error with respect to Circuit Judge. Cr.Code §§ 37, 135, 18 U.S.C.A. §§ 371, 1503.

3 Cases that cite this headnote

[20] **Criminal Law**
Necessity

Under rule permitting the Circuit Court of Appeals at its option to notice a plain error though not assigned, the option should not be so exercised as to bring the primary substantive rules to naught by an arbitrary exercise of power, but the circumstances must be such as to make the consideration of the point a legitimate exercise of discretion. Rules of the Circuit Court of Appeals for the Second Circuit, rule 10.

4 Cases that cite this headnote

[21] **Criminal Law**
Instructions Omitted or Refused
Criminal Law
Necessity
Criminal Law
Estoppel

Where no exception was taken to District Court's failure to follow language of requested instruction relating to defendant's good character or with respect to charge given on the subject, assignment of errors ignored the matter, District Court upon request gave additional instructions on good character, and defendant's counsel stated that he thought the court had covered all of the requests, the refusal to give requested instruction was not open to review. Rules of the Circuit Court of Appeals for the Second Circuit, rules 9, 10.

2 Cases that cite this headnote

[22] **Criminal Law**
Setting Forth Errors and Irregularities as to Instructions

The primary purpose of rule providing that District Judges shall not allow any bill of exceptions unless it contains the whole charge to the jury, and requiring the party excepting to state distinctly the several matters of law in the charge to which he excepts, is to direct the mind

of the District Judge to the precise point so that he may have fair opportunity to reconsider and change a ruling if so advised, and also to obviate injustice and mistrials due to inadvertent errors. Rules of the Circuit Court of Appeals for the Second Circuit, rule 9.

7 Cases that cite this headnote

[23] **Criminal Law**
Necessity of Specific Exception

The Circuit Court of Appeals would not exercise its discretion to set aside standing rules and review a challenge to the legal accuracy of a charge where the failure of the District Judge to follow the text of a requested charge was induced by the action of counsel and the evidence of guilt was convincing. Rules of the Circuit Court of Appeals for the Second Circuit, rules 9, 10.

2 Cases that cite this headnote

[24] **Conspiracy**
Acts of Coconspirators

It is not necessary that each of the conspirators participate in or have knowledge of all of the operations of a conspiracy, but a conspirator may join at any point in its progress and be held responsible for all that may be or has been done.

12 Cases that cite this headnote

[25] **Conspiracy**
Obstructing Justice, Bribery, and Perjury

Evidence justified jury's conclusion that a criminal conspiracy existed to influence and obstruct the administration of justice and defraud the United States of its right to the conscientious action of a Circuit Judge free from corruption, and that judge's codefendant knowingly became a party to the conspiracy and participated in the execution of its purposes in so far as they related to a particular case. Cr.Code §§ 37, 135, 18 U.S.C.A. §§ 371, 1503.

7 Cases that cite this headnote

[26] **Conspiracy**
Acts of Coconspirators

A charge of engaging in a far-reaching conspiracy cannot be avoided by showing that what the accused conceived to be a limited conspiracy turned out to be a conspiracy of wider range of which the supposed smaller one was in fact but a segment, and it is enough that accused knew he had connected himself with a criminal conspiracy, even though he was unaware of its full extent.

2 Cases that cite this headnote

[27] **Conspiracy**
Issues, Proof, and Variance

In prosecution for conspiring to obstruct the administration of justice and to defraud the United States, even if Circuit Judge's codefendant was not criminally connected with general conspiracy and was involved in a separate conspiracy, there was not a fatal variance between allegations and proof, but proof in respect of conspiracy with which codefendant was not connected could be regarded as incompetent with respect to him, where indictment alleged in a separate paragraph pendency of appeal in a particular case with which codefendant was allegedly connected, proof corresponded with those allegations, and District Judge instructed jury to confine themselves, in passing on question of codefendant's guilt or innocence, to evidence relating to him without reference to that which related only to Circuit Judge. Cr.Code §§ 37, 135, 18 U.S.C.A. §§ 371, 1503.

5 Cases that cite this headnote

Attorneys and Law Firms

***836** John E. Mack, of Poughkeepsie, N.Y. (William E. Leahy and Wm. J. Hughes, Jr., both of Washington, D.C., and E. Donald Wilson, of New York City, of counsel) for appellant Manton.

Harry E. Ratner, of New York City, (John J. Sweedler, of New York City, of counsel), for appellant George M. Spector.

John T. Cahill, U.S. Atty., of New York City (Mathias F. Correa, Frank H. Gordon, Silvio J. Mollo, and Robert L. Werner, Asst. U.S. Attys., all of New York City, of counsel), for the United States.

Before STONE and SUTHERLAND, Circuit Justices, and CLARK, Circuit judge.

Opinion

SUTHERLAND, Circuit Justice.

This is an appeal from a judgment in pursuance of a verdict of conviction upon an indictment charging the above named defendants, together with William J. Fallon, John L. Lotsch, and Forrest W. Davis, with a conspiracy to obstruct the administration of justice and to defraud the United States. The statutes to be considered in connection with the indictment are Secs. 88 ***837** and 241, Title 18 U.S. Code, 18 U.S.C.A. §§ 88, 241, printed in the margin.[1] Each of the three defendants last named pleaded guilty

The indictment names as defendants Manton, Spector, Fallon, Lotsch and Davis, and alleges that they, together with Archie M. Andrews, now deceased, Alfred F. Reilly and Almon B. Hall, and divers other persons to the grand jurors unknown, conspired to commit offenses against the United States, to wit: corruptly to endeavor to influence, obstruct and impede the due administration of justice in suits pending before certain courts of the United States; and to defraud the United States of and concerning its right to have the lawful functions of the judicial power of the United States exercised and administered free from unlawful impairment and obstruction, and more particularly its right to the conscientious, faithful, disinterested and unbiased judgment and action of the defendant Manton as the Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Circuit free from corruption, partiality, improper influence, bias, dishonesty and fraud.

The indictment further alleges that Manton was a stockholder in, or wholly or substantially owned or controlled, a number of corporations, some of which are named; that Fallon was an intimate acquaintance of Manton; that the conspirators knew that certain cases would be, during the course of the conspiracy, pending in and before the Circuit Court of Appeals for the Second Circuit and certain district courts; that several cases, named and described, were pending from time to time in these courts between the years 1930 and 1939, in the decision of which Manton participated; that it was a part of the conspiracy that Fallon would hold himself out as intimately acquainted with Manton and would represent to litigants and parties interested in these and other cases that, by reason of such association and intimacy, he could and would procure action favorable to such litigants and parties; that Fallon would seek out litigants and parties interested in these cases and would be sought by them for the purpose of having Fallon procure such action, in virtue of Manton's office, position, power and influence; that Manton would accept and receive and agree to accept and receive sums of money as gifts, loans and purported loans in return for such action, and would corruptly act in each of these cases without regard to the merits.

The indictment sets forth, and alleges the particulars of, twenty-eight distinct overt acts committed in pursuance of the conspiracy and participated in by Manton and one or more of the other conspirators.

Manton demurred to the indictment and entered a motion to quash on the grounds: (1) that the indictment charged not one single conspiracy but a number of separate and distinct conspiracies in one count, (2) that the indictment did not state an offense, (3) that more than one crime was charged in the indictment. Both the demurrer and motion to quash were overruled.

The case was tried before the district court and a jury and resulted in a verdict of conviction against both appellants, upon which final judgments were rendered imposing imprisonment and fine. From these judgments appellants have separately appealed to this court. The cases have been separately presented, and we shall separately consider them.

***838** The Case of Manton.

The appellant Manton assails the judgment upon several grounds, which, so far as necessary to be considered, may be epitomized as follows:

1. That the court erred in overruling the demurrer to the indictment and motion to quash;

2. That the evidence fails to connect him with any conspiracy and the court erred in refusing his request to instruct the jury to acquit;

3. That his motions to strike out testimony of certain witnesses were erroneously denied; and that evidence was improperly admitted against his objections;

4. That his cross-examination upon collateral matters was so unfairly conducted as to require a reversal;

5. That the court erred in refusing certain requests to charge the jury and in respect of some instructions actually given;

6. That the conduct of the trial and the charge to the jury were so hostile and unfair as to require a reversal.

[1] First. Manton's contention is that the indictment sets forth in one count a number of distinct conspiracies; that is to say, that the allegations in respect of each of the suits set forth a separate and distinct conspiracy. But this confuses the conspiracy, which was one, with its aims, which were many. The indictment charges a general conspiracy, continuous in operation and single in character, having relation to no particular litigation, but constituting an agreement between Manton and Fallon by the terms of which, without limit as to time, Fallon was to seek out litigants and parties, whether then known or unknown, who were interested in suits, then or thereafter pending, and, in effect, represent to each of them that Manton would accept sums of money in return for corrupt judicial action by him favorable to the interests of those who paid. In short, the conspiracy to obstruct the administration of justice and to defraud the United States was to be consummated by sale of judicial action to all willing to pay the price. That this was a single continuing offense and not a number of distinct offenses is settled by numerous decisions.

Harvey v. United States, 2 Cir., 23 F.2d 561, presented a similar situation. There, in a single count, the indictment charged defendants, who were prohibition agents, with having conspired together and with other persons to obtain evidence of violations of the National Prohibition Act in order to seek and to receive bribes to influence their official acts. Evidence having been admitted of several distinct acts of the kind covered by the conspiracy, it was contended that this amounted to the admission of evidence of distinct conspiracies; but the court held the evidence to be proper, saying that it was competent to prove several offenses committed by the conspirators pursuant to their general criminal scheme.

[2] The conspiracy constitutes the offense irrespective of the number or variety of objects which the conspiracy seeks to attain, or whether any of the ultimate objects be attained or not. Williamson v. United States, 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278. Mr. Justice White, speaking for the Court in that case, concisely stated the rule, by saying (207 U.S. page 447, 28 S.Ct.page 170, 52 L.Ed. 278): 'The conspiracy is the offense which the statute defines, without reference to whether the crime which the conspirators have conspired to commit is consummated.' The indictment in that case charged that the defendants had conspired to suborn a large number of persons to commit perjury in proceedings for the purchase of public lands. The indictment was held good, although the persons to be suborned were not stated or the times or places particularized. It was not essential, the Court said, that these particulars should have been agreed upon since the criminality of the conspiracy charged consisted in the unlawful agreement to compass a criminal purpose.

[3] The offense becomes complete when the agreement is made. The only effect of the requirement that an overt act shall be shown is to permit an abandonment of the conspiracy in the meantime and the consequent avoidance of the penalty which the statute imposes. 'This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus poenitentiae, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. ' United States v. Britton, 108 U.S. 199, 204, 205, 2 S.Ct. 531, 534, 27 L.Ed. 698.

***839** United States v. Kissel, 218 U.S. 601, 607, 31 S.Ct. 124, 54 L.Ed. 1168, distinctly recognizes the rule that a conspiracy exists as soon as the agreement is made but may continue beyond the time of making it. 'But when the plot contemplates', the Court said (218 U.S.page 607, 31 S.Ct.Age 126, 54 L.Ed. 1168) 'bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one.' And again (218 U.S.page 608, 31 S.Ct.page 126, 54 L.Ed. 1168): 'A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous, the

partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act.'

[4] [5] Nor, contrary to Manton's contention, is the indictment bad for duplicity because it alleges that the conspiracy contemplated the violation of a criminal statute and also the defrauding of the United States. While there are some decisions which seem to lend support to the contention, the Supreme Court of the United States has held otherwise, and by its decision, of course, we are bound. Frohwerk v. United States, 249 U.S. 204, 210, 39 S.Ct. 249, 252, 63 L.Ed. 561. 'The conspiracy', the Court there said, 'is the crime, and that is one, however diverse its objects.' See also Magon v. United States, 9 Cir., 260 F. 811, 813; Anderson v. United States, 9 Cir., 269 F. 65, 76.

[6] It is further urged that the indictment charges, and that the government sought to prove, a conspiracy to accept and secure bribes, and that this is not an indictable conspiracy. We do not stop to inquire whether in the present case the conclusion would follow from the premises, since it is clear that the premises are not true. Perhaps this sufficiently appears from what we have already said; but we add a few words at this point which, at least, may be useful by way of emphasis. The indictment does not charge as a substantive offense the giving or receiving of bribes; nor does it charge a conspiracy to give or accept bribes. It charges a conspiracy to obstruct justice and defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense. The long argument upon the point consequently fails for lack of foundation to give it support.

Second. The testimony clearly establishes the making of a large number of payments to Fallon by or in the interest of litigants with the understanding that the moneys would be transferred in the form of gifts or loans to the defendant Manton or to corporations which he owned or controlled or in which he was interested, in return for corrupt favorable action on his part in the decision of the several suits and controversies named in the indictment and others not named. Proof of acts to effect the object of the conspiracy alleged in respect of each of these suits and controversies is full and ample; and the only question which requires consideration is whether Manton was in fact a party to a conspiracy which indubitably these acts were calculated to effect.

[7] [8] It is not necessary that the participation of the accused should be shown by direct evidence. The connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference. Indeed, often if not generally, direct proof of a criminal conspiracy is not available and it will be disclosed only by a development and collocation of circumstances. In passing upon the sufficiency of the proof, it is not our province to weigh the evidence or to determine the credibility of witnesses. We must take that view of the evidence most favorable to the government and sustain the verdict of the jury if there be substantial evidence to support it. Hodge v. United States, 6 Cir., 29 F.2d 881.

[9] A careful reading of the record in the light of these principles satisfies us that the verdict of the jury must be upheld. It is not necessary to recount the evidence at length. It is enough to say ***840** that the jury could have found, and, in support of their verdict we may properly assume, did find, the following:

1. Fallon and Manton had been on friendly terms and in frequent contact for many years. Fallon had procured moneys with the understanding that they were to be paid to Manton or loaned to companies in which Manton was interested by or for the benefit of parties to several cases named in the indictment. Fallon had personally introduced to Manton some of these parties or their agents or attorneys. Fallon had been in contact with one or more persons connected with or interested in each of the cases, had held himself out to them as willing and able to buy Manton's favorable offices, and had secured payments for that avowed purpose. Indeed, Fallon's constant intermediation and his activities in connection with all cases involved in the charge of conspiracy is a most pertinent and significant fact tending to establish the singleness of purpose and the unbroken continuity of the conspiracy.

2. The first of the suits involved in the conspiracy, the Art Metal Works case, was begun in 1932, the defense being assumed by the Evans Case Company. Reilly, Resident of the company, was one of the conspirators. He advised with Fallon about the case on a number of occasions. He gave Fallon, at the latter's request, many sums of money aggregating thousands of dollars and for several years carried him on the payroll of the Evans Case Company at $100 per week and paid him other sums, the whole amounting to nearly $20,000. The district court, having decided the case against the Evans Case Company, the company appealed. In another case decided in its favor an appeal was taken by the losing party. After some negotiations between Reilly and Fallon, the former

expressed a willingness to pay $25,000 upon Fallon's assurance of favorable action by Manton on the appeal, $15,000 to go to Manton as a loan. At a later time, Reilly was informed by Fallon by telephone that he had learned that the decision would be favorable and 'that the Judge (Manton) was in bad circumstances for the money and wanted to know if I could not get $10,000 as quickly as possible.' About the same time, decisions favorable to the Evans Case Company were handed down, the opinions being rendered by Manton. Reilly then paid Fallon $10,000 in cash and also gave him three $500 checks. The $10,000 was entered in the books of the Evans Case Company as 'Prepaid Royalties, Air-Flow'. Subsequently, on motion of Reilly, the board of directors of the company directed that the item be transferred to the 'legal and professional account for litigation expense.'

During the summer of 1934, Reilly was introduced by Fallon to Manton, and thereafter Reilly, Manton and Fallon played golf together, and Reilly lunched with Manton at the Lawyers Club and went out with Manton and his wife, Fallon at times being present. In February 1939, Manton resigned his office. A day or two before the resignation was to take effect Manton called Reilly on the long-distance telephone and told him he understood he had Bill (meaning Fallon) on the payroll. Receiving an affirmative reply, Manton said: 'That will be very embarrassing for me if found out, because I heard they intend to investigate.' Manton repeated that it would be very embarrassing for him and Reilly responded: 'I don't know what to do about it.'

After the lapse of a few hours, Reilly had another long-distance telephone talk with Manton, first asking him if it was all right to talk. Manton answered: 'I don't think exactly.' Manton then asked Reilly for his telephone number and said that he would call him back under another name. Later in the same day, the call was made; and the former conversation was repeated in substance. In the course of this conversation, Manton spoke of the statute of limitations and said that it would protect them in the Art Metal investigation; that anything that was three years old was outlawed. Manton again spoke of Fallon being carried on the payroll, saying that it was a great embarrassment to him and to get rid of the records because of the Art Metal investigation. Manton admitted that telephone conversations between himself and Reilly occurred, and that he initiated them, but gave a different version of what was said.

A few days later, Reilly directed the bookkeeper to procure all the records and to destroy them. The bookkeeper destroyed the records of the company up to 1935- cashbooks, ledgers, bills, vouchers and everything with the exception of some ***841** papers subsequently discovered and turned over to the government.

3. In the year 1934, an appeal was taken from the decision of the district court in Smith v. Hall, a patent infringement case. More than a million dollars was involved. Hall was introduced by Forrest W. Davis, one of the defendants named in the indictment, to Fallon as one who, Davis had advised, could help him in the litigation. Hall told Fallon of the litigation and was asked by Fallon for copies of the decision, briefs and record so that he might show them to Manton. At a later meeting, Fallon reported that Manton after a conference had said that for $75,000 a decision in Hall's favor could be obtained. It was finally agreed that the amount should be reduced to $60,000. A check was given for $5,000 on account. So far, there is no direct evidence connecting Manton with this transaction. But later along, Hall, being dissatisfied with the situation, Fallon agreed to obtain Manton's note, and upon that basis a second check for $5,000 was given, and thereafter Hall received a note signed by Manton payable to Davis for $5,000. Other payments from time to time were made to Fallon, the final amount to complete the payment of the $60,000 being made after a decision in Hall's favor was handed down by Judge Manton. In the summer of 1938, after the beginning of an official investigation respecting Manton, Davis, who theretofore had never met Manton, received a telephone call from him in response to which Davis called on Manton at the latter's residence. Manton asked him whether he, Davis, had lent any money to Manton. Davis replied that he had not. Here again, Manton admitted the conversation, but gave a different version of it.

4. Three other cases involved in the conspiracy conveniently may be considered together. Two of them, Electric Autolite Company v. P. & D. Manufacturing Company, and General Motors Corporation v. Preferred Electric & Wire Corporation were patent cases. The third was a criminal prosecution against John L. Lotsch.

Lotsch was a patent attorney and with other counsel represented the defendants in the patent cases. The district court had decided both cases against Lotsch's clients, and both were reversed on appeal. Pending the appeal, Lotsch was introduced to Fallon who asked Lotsch whether he could secure loans for Manton from a bank in which Lotsch was an officer, and told him that if he could obtain them he would introduce Lotsch to Manton. Lotsch was then introduced to Manton, and he and Manton agreed that loans in the sum of $25,000 would be obtained. The loans were made, $10,000 at once and $15,000 a short time later. Thereafter, the Electric Autolite case was decided in favor of Lotsch's client; Manton handing down the opinion.

In the General Motors case, Lotsch, seeking a stay which had been denied by the lower court, applied to Manton who issued an order to show cause and, after argument, granted the stay. On the day of the argument, Manton requested of Lotsch an additional loan of $25,000, which was made, but in the name of Sullivan, president of a company which Manton controlled. The loan was guaranteed by Manton who also furnished collateral as security. When the loan was made, Sullivan drew his check for the full amount payable to himself which he then indorsed in blank and which, after being certified by the bank, was handed to Manton. Manton had asked that the check be made to his own order, but Lotsch suggested that the course which was followed would be better, since the check could then be dealt with by Manton and no one would know for whom it was made. The check was indorsed by Manton and deposited to the credit of The Financial Corporation.

In an opinion by Manton, the decree in the General Motors case was reversed. A short time thereafter, Sullivan having died, Manton executed a new note, and the loan was transferred to him and Sullivan's note released.

In December, 1935, Lotsch was indicted, in a district court sitting in the second circuit, for taking a bribe. He discussed the matter with Manton. In February following, the case was assigned to Judge Thomas and set for trial. Manton told Lotsch that he had arranged to see Thomas and subsequently reported to Lotsch that he had seen Thomas who would take care of the case for $10,000 paid before trial. Lotsch borrowed the money and paid it to Manton in two sums of $5,000 each. There is no proof that Thomas, who was not called as a witness, received any part of the money.

At the trial, Thomas granted Lotsch's motion for a directed verdict of acquittal. Thereupon, Lotsch was discharged but ***842** immediately rearrested on a charge of extorting money under color of office. Lotsch sought out Judge Manton who expressed the opinion that the charge presented a case of double jeopardy. At this conversation Manton gave Lotsch a copy of the government's trial brief in the earlier case which Thomas had handed Manton. Lotsch was indicted upon the charge and sued out a writ of habeas corpus, which was argued before a district judge who dismissed the writ. From this action Lotsch appealed. The appeal was heard by the appellate court, Manton presiding. The court reversed the district court and directed that the indictment be dismissed. Following the argument, and before the decision, Lotsch discussed the case with Manton who suggested that a reply brief be filed with respect to a certain point that had been raised. A reply brief was subsequently filed and thereupon, and before the decision of the case, Manton telephoned Lotsch to meet him on a designated Long Island train. The meeting took place in a parlor car, and Manton showed Lotsch a draft of the proposed opinion of the court, which Lotsch read. After reading it, Lotsch suggested the elimination of certain things which he thought objectionable; and Manton accepted two of the suggestions. Lotsch also objected to a criticism directed against Judge Thomas, but Manton told him that could not be taken out because his colleagues would not stand for it. Thereafter, a decision in Lotsch's favor was handed down.

In the summer of 1937, Lotsch was prosecuted for still another offense. He was convicted in 1938 and appealed from the judgment. He showed the record to Manton and discussed it with him. Manton told him that the case would be reversed when reached because of certain errors committed at the trial. In August, 1938, at Manton's request, Lotsch met Manton and had a conversation with him at the latter's home on Long Island. Manton told him that State District Attorney Dewey was making an investigation in connection with the Sullivan matter and that Manton understood Dewey was looking for Lotsch with a view of having him subpoenaed. He suggested that Lotsch go away until the matter blew over. In pursuance of the suggestion, Lotsch went into Connecticut where he stayed with his daughter for two weeks.

In February, 1939, just after Manton's resignation, he and Lotsch again met at an office in New York. Manton there suggested that Lotsch see the acting United States District Attorney and tell him that a certain loan that had been mentioned by Dewey in a public letter, and other loans, were regular business transactions. During the same month Lotsch informed Manton that the fact that he, Lotsch, had borrowed $10,000 had been disclosed; whereupon Manton told Lotsch that that matter in connection with Judge Thomas, he should carry to his grave and, if asked it before the grand jury, he should say that he paid the $10,000 to Judge Millard, an attorney then deceased- 'Judge Millard is dead and no one can testify against him.' Manton suggested that Lotsch go into Connecticut again, but Lotsch being without funds, Manton gave him the name of a person from whom he might borrow the necessary amount. In that or a later conversation, Manton inquired when the Thomas payment was made and being informed said that the statute of limitations would outlaw that. Manton admitted having conversations with Lotsch, but denied Lotsch's version of them.

5. In 1936, suit was brought in the district court by Schick Industries against Dictograph Products Company, Inc. It was a patent infringement case involving the claim of the

Schick razor against the Packard razor. The district court had entered an interlocutory decree and appointed a special master and required the Dictograph Company to furnish a $50,000 bond. Archie Andrews held the principal interest in the Dictograph Company and apparently felt much disturbed by the action of the district court. He was introduced to Morris Renkoff, told him of his trouble and was informed by Renkoff that he could help if the case came to the appellate court because he had a man who could 'fix things up'. With Andrews authority to do so, Renkoff then saw Fallon who promised to take the matter up with Manton. Shortly thereafter, Fallon reported to Renkoff that he had seen Manton and that the case would be taken care of for $50,000, provided that an attorney named Weisman were employed by Andrews. Andrews thought the amount too high and suggested $25,000. After Fallon had been told, he reported that he had seen Manton and that the amount would be acceptable. It was then agreed between Fallon, Renkoff and Andrews that $10,000 would be paid at once and the balance after a favorable ***843** decision. The $10,000 was paid to Fallon, part of it being a loan from Renkoff. A written statement signed by Renkoff and delivered to Andrews acknowledged the receipt of the $10,000 for the purpose of purchasing Dictograph Products Company stock. The amount was paid to Fallon in cash, and Fallon left, ostensibly to pay the amount to Manton. In the course of an hour Fallon returned and told Renkoff: 'Everything is O.K. You can go and tell Archie Andrews that he is going to get the decision in his favor. There will be a bond of $25,000 and no man in the business'. The evidence does not show whether the $24,000, or any part of it, was in fact received by Manton.

In 1936, Renkoff had been convicted of a criminal offense and sentenced to imprisonment. The judgment was affirmed and thereafter Andrews enlisted the assistance of Spector, to whom he made a number of payments amounting in the aggregate to a very large sum. These payments began while the appeal was pending in the Schick case and were completed either before or immediately after its final determination. Following these payments, Spector turned over equivalent sums in the form of loans to the National Cellulose Company in which Manton held a large interest. Other sums similarly received he also turned over, in the form of loans aggregating more than $20,000 to Manton's confidential and official secretary who was an officer of a corporation in which Manton likewise had a large interest. We shall discuss, in further detail, these devious proceedings when we come to deal with the case of Spector.

On December 2, 1936, Manton ordered that the Schick case be set for argument on January 4, 1937. The schedule of the court showed that Manton was to sit on that day. Counsel for the Schick company, having noted that fact and that Manton was not to sit on January 11th, secured an agreement with opposing counsel to postpone the argument until the latter date; and Manton entered an order accordingly. Subsequently, the schedule was changed so that Manton would sit on January 11th. A further Postponement was sought, and counsel on both sides appeared before Manton in chambers for argument on the request. Counsel for the Schick company, before appearing, examined the assignment of judges with a view of selecting an adjourned date. They selected February 11th, a date when Manton was not to sit. On the argument, Manton suggested February 4th, a day on which he was scheduled to sit, but counsel for both parties after conferring agreed upon February 11th. Manton, putting this agreement aside, said: 'This case will be argued on February 4th.' And the case was argued on that day, Manton presiding. The decision was against the Schick Company, Manton concurring in the opinion with another judge, the third judge dissenting.

In the foregoing recital of facts and circumstances, to which others less significant might be added, we have set forth some matters with respect to which Manton's immediate connection is not shown by the evidence. And we have done so because of the light they shed upon the relevant evidence in respect of Manton's partnership in the conspiracy and the aid they furnish toward a better understanding of that matter. But in considering the contention that the court erred in submitting to the jury the initial question whether Manton was a party to the conspiracy, we have put these facts and circumstances aside. Of course, Manton's partnership in the conspiracy being settled prima facie, these matters become relevant as acts and declarations of co-conspirators in the execution of the conspiracy, by which Manton would be bound.

It is true that Manton denied all incriminating testimony, and that, in the main, the evidence tending to show Manton's partnership in the conspiracy came from the lips of convicted co-conspirators and other witnesses of bad or dubious character. Indeed, in a case like this, it is unlikely that it would be otherwise. But the credibility of these witnesses and the weight to be given their testimony, as we have already said, were questions for the jury and are matters beyond the scope of judicial review. Moreover, the record contains a mass of documentary evidence-accounts, cancelled checks, promissory notes, etc.- not only corroborative of the oral testimony, but adding independent strength to the government's case.

We deem it unnecessary to comment further upon the evidence. It is enough to say that, if believed by the jury, as we may properly assume it was, it discloses a state of

affairs so plainly at variance with the claim of Manton's innocence as to make the verdict of the jury unassailable. The circumstances taken altogether amply ***844** sustain that conclusion. Among these circumstances the following are especially significant: (a) The long and friendly relations between Fallon and Manton. (b) The employment of Fallon in obtaining loans for Manton corporations. (c) The apparently gratuitous introduction by Fallon to Manton of persons interested in cases while they were under consideration or pending. (d) Lotsch's testimony that after being introduced by Fallon he paid to Manton $10,000 ostensibly for the corruption of Judge Thomas, received from Manton a trial brief of the government in that case, consulted with him about the language of an opinion before it was handed down, was advised to leave New York because of an investigation then in progress or threatened, was admonished to keep secret the Thomas matter, and that Manton, after being told, upon inquiry by him, the date when a particular transaction had occurred, said it was barred by the statute of limitations. (e) Manton's relations with Reilly, their telephone conversations, in which Manton expressed anxiety about Fallon's being carried on the payroll because of a pending investigation; Manton's suggestion that the circumstance would be embarrassing to him and that the record pages relating to the matter should be pulled out, that certain records be destroyed because of the Art Metal investigation, and that the statute of limitations would protect them in that investigation. (f) The manipulation of the schedule of assignments of judges to enable Manton to sit in the Schick case. (g) The loans made at Manton's request by or through the intervention of persons interested in some of the cases during their pendency, one of the most significant of these being the loan of $25,000 made in the name of Sullivan by Lotsch to Manton at the latter's solicitation on the very day of the argument of the General Motors case, the proceeds of which were immediately handed by Sullivan to Manton, a method adopted to conceal Manton's connection with the transaction. Similar technique appears in respect of the loans made by Andrews to or for corporations in which Manton was interested through Spector as a conduit, the details in respect of which will more fully appear when we come to consider the case of Spector.

Third. It is contended that the trial court committed many errors against appellant in receiving and in refusing to strike out evidence. Some of the claims of error so clearly are without merit that we put them aside at once. Others we consider.

[10] Motions made to strike out testimony as to statements made by Fallon in Manton's absence it is urged should have been granted. This evidence was offered and received before it was shown that Manton was a party to the conspiracy, the objection to the testimony going only to the order of proof; and so viewed the point falls for want of merit, for the rule has been so long established as to be elementary that the order of proof is a matter addressed to the discretion of the trial court. We are unable to find that this discretion was abused in any of the instances mentioned in the brief.

[11] It is urged that testimony in respect of the Lotsch trial before Judge Thomas was improperly received. The ground advanced is that the case was in a district court while the indictment related only to proceedings in the Circuit Court of Appeals. This is clearly incorrect. The indictment specifically mentions this particular case as having been duly brought in the United States District Court for the Southern District of New York and includes that court and this case by general words of description as being within the purview of the conspiracy.

[12] The trial court over objection admitted in evidence what are called recordak facsimiles of checks. The objection made to this ruling of the court is that such facsimiles do not constitute the best evidence. These recordaks are photostatic reproductions of the face of checks which have been paid; and they were offered as evidence of such payments. It is argued that the original checks themselves were the best evidence and that their absence should have been accounted for as a prerequisite to the admission of the recordaks. With this contention we cannot agree. These recordaks are made and kept among the records of many banks in due course of business and are within the words of 28 U.S.C. § 695, 28 U.S.C.A. § 695.[2] Their accuracy is not questioned. They represent, ***845** in the course of a year, perhaps millions of transactions. No one at all familiar with bank routine would hesitate to accept them as practically conclusive evidence. As proof of payment, they constitute not secondary but primary evidence

[13] [14] [15] But putting all this aside, the best evidence rule should not be pushed beyond the reason upon which it rests. It should be 'so applied', as the Supreme Court held in an early case, 'as to promote the ends of justice, and guard against fraud or imposition.' Renner v. Bank of Columbia, 9 Wheat. 581, 597, 6 L.Ed. 166. See also United States v. Reyburn, 6 Pet. 352, 366, 8 L.Ed. 424; Minor v. Tillotson, 7 Pet. 99, 100, 8 L.Ed. 621. The rule is not based upon the view that the so-called secondary evidence is not competent, since, if the best evidence is shown to be unobtainable, secondary evidence at once becomes admissible. And if it appear, as it does here, that what is called the secondary evidence is clearly equal in probative value to what is called the primary proof, and that fraud or imposition, reasonably, is not be feared, the

reason upon which the best evidence rule rests ceases, with the consequence that in that situation the rule itself must cease to be applicable, in consonance with the well established maxim- cessante ratione legis, cessat ipsa lex.

An over-technical and strained application of the best evidence rule serves only to hamper the inquiry without at all advancing the cause of truth. 'The fundamental basis,' the Supreme Court has said, 'upon which all rules of evidence must rest- if they are to rest upon reason- is their adaptation to the successful development of the truth.' Funk v. United States, 290 U.S. 371, 372, 381, 54 S.Ct. 212, 215, 78 L.Ed. 369. There is not the slightest reason to suspect that this fundamental basis was affected in the present instance.

[16] Manton's brief contains a short, obscurely-placed paragraph complaining of the action of the court in admitting in evidence a carbon copy of a letter without accounting for the absence of the 'original'. While there is some conflict in the decisions, the better rule is that so-called original and carbon copies are duplicate originals; and that one is as much primary evidence as the other. See 2 Jones on Evidence (2d Ed.) Sec. 798. They are made upon sheets of paper between which carbons have been interposed. The messages are impressed at the same time and by the same impact. To call one of them an original and the other a copy is simply to ignore the obvious.

[17] [18] Fourth. The attack upon the cross-examination in respect of collateral matters as being so unfair as to require a reversal may be quickly disposed of. The office of cross-examination is to test the truth of the statements of the witness made on direct; and to this end it may be exerted directly to break down the testimony in chief, to affect the credibility of the witness, or to show intent. The extent to which cross-examination upon collateral matters shall go is a matter peculiarly within the discretion of the trial judge. And his action will not be interfered with unless there has been upon his part a plain abuse of discretion. 3 Wharton's Criminal Evidence (11th Ed.) Sec. 1308. See Alford v. United States, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624. We find no such case here. The cross-examination, whether upon collateral matters or not, while prolonged and searching, presents nothing which calls for interference by an appellate court. And the rulings might be equally defensible in some instances if the trial judge, in the exercise of his discretionary power, had ruled the other way. See Johnston v. Jones, 1 Black 209, 226, 17 L.Ed. 117. And in some instances, the rulings well might be criticized as restricting overmuch the government's right of cross-examination.

[19] Fifth. The trial judge refused to charge the jury that they might consider the question whether the decisions here involved were correct. On Manton's behalf this is assailed as error on the ground that there could be no obstruction of justice unless the decisions were wrong and ***846** that the jury should have been so told. There is nothing in the point.

The crime charged in the indictment became complete the instant the conspiracy was formed (provided only that there could be no prosecution unless followed by some overt act), whether the object of the conspiracy ever was consummated, or, if consummated, whether the result, considered apart, was conformable to law or the reverse. See Goldman v. United States, 245 U.S. 474, 476, 477, 38 S.Ct. 106, 62 L.Ed. 410. The conspiracy here contemplated the payment of money to induce a judge to exercise his judicial power in favor of the bribe-givers, without regard to the merits. If the decisions finally rendered in pursuance of the conspiracy be legally sound the fact is immaterial. The evidence here, indeed, does not forbid the inference that generally Manton refrained from agreeing to the final step except where the correctness of the decision to be rendered seemed to him to be fairly clear, and, in consequence, discovery and exposure less probable.

We cannot doubt that the other judges who sat in the various cases acted honestly and with pure motives in joining in the decisions. No breath of suspicion has been directed against any of them and justly none could be. And for aught that now appears we may assume for present purposes that all of the cases in which Manton's action is alleged to have been corruptly secured were in fact rightly decided. But the unlawfulness of the conspiracy here in question is in no degree dependent upon the indefensibility of the decisions which were rendered in consummating it. Judicial action, whether just or unjust, right or wrong, is not for sale; and if the rule shall ever be accepted that the correctness of judicial action taken for a price removes the stain of corruption and exonerates the judge, the event will mark the first step toward the abandonment of that imperative requisite of even-handed justice proclaimed by Chief Justice Marshall more than a century ago; that the judge must be 'perfectly and completely independent with nothing to influence or control him but God and his conscience.'

Sixth. We are unable to discover anything in the record which gives support to the contention that Manton was not given a fair trial or that the charge to the jury was hostile or unfair. On the contrary, the record plainly discloses the patience and fairness of the judge in dealing with the various questions which arose during the trial.

We find it unnecessary to pursue the matter further, except as it relates to the requested instruction in respect of good character and the court's charge on the subject; and we pass to a consideration of that question.

[20] [21] Manton requested the district court to instruct the jury that evidence of good character is substantive evidence and that such evidence might alone raise in their minds reasonable doubt of the defendant's guilt. The court in substance instructed the jury that the establishment of a good reputation was a fact to be considered by the jury and might in an otherwise doubtful case turn the scales in favor of the defendant; that it was not in itself a sufficient answer to a criminal charge but only one of the circumstances in evidence to be considered in determining whether guilt had been established beyond a reasonable doubt.

No exception was taken to the action of the court in failing to follow the language of the request or with respect to the charge itself on the subject. But this is not all. Fifty-eight assignments of error are made, among them several relating to refusals of the court to charge as requested and to specific parts of the charge as given. But, significantly, the assignment of errors ignores altogether the question of good character and, clearly, the default was intentional. The omissions contravene Rule 9 which requires that a party excepting to the charge shall state distinctly the several matters of law to which he excepts, and Rule 10 which requires that when the error claimed is to the charge, the assignments of error must set out the part challenged, whether it be to an instruction given or to a request refused. If these rules are to be respected, the question presented is not open to review.

It is true that Rule 10, as counsel belatedly suggests, permits the court, at its option, to notice a plain error though not assigned. But since the exercise of the power is optional, the circumstances must be such as to make the consideration of the point a legitimate exercise of discretion. The option should not be so exercised as to bring the primary substantive rules to naught by an arbitrary exercise of power.

At the conclusion of the charge, the judge stated to counsel that he would be ***847** glad to hear any exceptions they desired to take to the charge. Manton's counsel directed the court's attention to several requests relating to matters other than character, and asked that these be given. The court gave one of them, declining to give the others. To each refusal counsel duly excepted. In respect of his request on the subject of good character, counsel asked that it be given 'as requested exactly' and added: 'I do not believe that your Honor did instruct the jury that it was their duty to acquit the defendant Manton if the evidence of good character entered in his favor raises a reasonable doubt in their minds.' To this the court responded: 'Of course, I so instructed them, but if you did not understand it that way, I would rather give them the instruction * * * (you) have than give you an exception on it. However, you want 38 (the good character request) given to them, do you? ' Counsel said, 'Yes', and the court responded, 'Very well.' The court then told the jury that he had been asked to emphasize a little more the effect of good reputation. After paraphrasing a part of what he had before said, the judge added that 'evidence of good reputation is only one fact, like other facts, to be taken into consideration in weighing all the evidence in the case to determine whether there is a reasonable doubt, or whether there should be a verdict of acquittal or conviction.'

Upon concluding his additional instructions, the court said: 'I think I have covered them all,' to which counsel for Manton responded: 'I think you did, your Honor.' The court then asked whether there were any other exceptions, to which there was no response.

[22] The colloquies between court and counsel make manifest the willingness of the trial judge to comply with the good character request. The primary purpose of Rule 9, and the essential function of the specific exceptions it requires, is to direct the mind of the trial judge to the precise point so that he may have fair opportunity to reconsider and change a ruling if so advised, and also to obviate injustice and mistrials due to inadvertent error. United States v. U.S. Fidelity & Guaranty Co., 236 U.S. 512, 529, 35 S.Ct. 298, 59 L.Ed. 696; Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 82, 39 S.Ct. 435, 63 L.Ed. 853.

Quite evidently, the trial judge believed he had substantially complied with the request and, quite as evidently, Manton's counsel was then of the same view. For he not only assented to the suggestion that the various matters had all been covered but further evinced his satisfaction by failing to enter an exception after his attention pointedly had been called to the subject. If, instead of remaining silent, he had spoken, an opportunity would have been afforded the trial judge to ascertain from counsel the precise point of difference between what was requested and what was given. We cannot avoid the conclusion that such a course would have borne fruit, in view of the expressed willingness of the judge substantially to follow the request and his belief that he had done so.

A somewhat similar situation was presented to the Supreme Court in Boyd v. United States, 271 U.S. 104, 108, 46 S.Ct. 442, 443, 70 L.Ed. 857. In that case, as in

this, the trial judge had given, at appellant's suggestion, an additional instruction to the jury, and Mr. Justice VanDevanter, speaking for the Supreme Court, answered the claim of error on the part of the appellant by saying: 'With that addition the charge elicited no criticism or objection from the defendant, although there was full opportunity therefor. It evidently was regarded as consistent and satisfactory. Besides, in view of what was said in other parts of the charge, we are justified in assuming that, had the court's attention been particularly drawn at the time to the part complained of now, it would have been put in better form. Certainly, after permitting it to pass as satisfactory then, the defendant is not now in a position to object to it. McDermott v. Severe, 202 U.S. 600, 610, 26 S.Ct. 709, 50 L.Ed. 1162; United v. U.S. Fidelity & Guaranty Co., 236 U.S. 512, 529, 35 S.Ct. 298, 59 L.Ed. 696; Norfold & Western Ry. Co. v. Earnest, 229 U.S. 114, 110, 120, 33 S.Ct. 654, 57 L.Ed. 1096; Ann. Cas. 1914C., 172.' See also San Antonio & A. P. Ry. v. Wagner, 241 U.S. 476, 480, 36 S.Ct. 626, 60 L.Ed. 1110; Harrison v. United States, 2 Cir., 7 F.2d 259, 261, 262.

It is fair to conclude that the introduction of the point now is a mere afterthought. Even in the Manton brief, it is not listed as a substantive error but, in the shortest possible terms, is treated only as an instance of what is called the hostility ***848** and unfairness of the trial judge. And it was not until counsel came to write a reply brief, by leave of the court after the argument was concluded, that really serious consideration was given to the matter or any reference made to the plain error proviso.

[23] If the failure to enter an exception or assign error had been a mere inadvertence the matter might stand in a different light. But that view cannot be indulged. Plainly enough, counsel consciously and intentionally failed to save the point and led the trial judge to understand that counsel was satisfied. We see no warrant for the exercise of our discretion to set aside standing rules, so necessary to the due and orderly administration of justice, and review the challenge to the legal accuracy of the charge where, as here, the failure of the judge to follow the text of the requested instruction was, at the last, induced by the action of counsel; and where, moreover, the evidence of guilt is convincing.

Spector's Case

We pass now to a consideration of the case of Spector. Most of the contentions urged in his behalf are the same as those advanced by Manton and have already been answered. The only remaining question which we find it necessary to consider is whether the evidence was sufficient to warrant the trial court in submitting the case to the jury.

[24] [25] [26] First. The theory of the indictment and of the prosecution at the trial is that Spector, although not one of the original conspirators or connected with its consummation generally, knowingly joined the general conspiracy and participated in the execution of its purposes in so far as they related to the Schick case.

It is not required that each of the conspirators shall participate in, or have knowledge of, all its operations. He may join at any point in its progress and be held responsible for all that may be or has been done. Allen v. United States, 7 Cir., 4 F.2d 688, 692; Baker v. United States, 4 Cir., 21 F.2d 903, 905; Rudner v. United States, 6 Cir., 281 F. 516, 519; Commonwealth v. Anderson, 64 Pa.Super. 427. The evidence warrants a finding that Andrews was a party to the general conspiracy. His special interest was of course in the Schick case; and he had joined with Fallon and Renkoff in the effort to secure Manton's corrupt action in that case. Renkoff having dropped out, Andrews sought and obtained the assistance of Spector in the further prosecution of this criminal enterprise. As already appears, Andrews made many payments of money to Spector aggregating a very large sum. On one occasion a payment of $7,500 made to Spector was first designated as a 90-day loan to him. Spector, after some hesitation, agreed to give his note for the amount. He failed to do so and the amount, having first been entered as prepaid insurance, was later entered in the suspense account and finally charged to Andrews personally.

We have already discussed the way in which Spector lent himself as an intermediary between Andrews and Manton to transfer from the former to the latter the large sums of money which were loaned. And it is quite evident that the purpose of such action was to conceal the true character of the transactions. In that connection a significant item of evidence may be cited. Spector had received from Andrews $5,000. Instead of transferring the sum by one check to Manton's secretary, he first drew a check for $2,437.60 and a day or two later another check for $2,562.40, the two aggregating $5,000, the proceeds of both finding their way into the hands of a Manton corporation. On another occasion the sum of $5,000 was divided into checks, one for $2,615.66 and the other for $2,384.34. Both checks bear the same date and the proceeds followed the same course as in the preceding instance. Taken in connection with other evidence, it is hard to explain these devices upon any other theory than that they were adopted to conceal the real facts and to aid in the consummation of the criminal conspiracy. Certainly they are not the accompaniments of honest business. The circumstances of secrecy, intrigue and deviousness, and the attempts to conceal the real nature of the transactions,

which the evidence discloses, are hallmarks of fraud and dishonesty, justifying the jury's conclusion that a criminal conspiracy existed to influence and obstruct the administration of justice and defraud the United States of its right to the conscientious action of the defendant Manton free from corruption; and that Spector knowingly became a party to that conspiracy. Spector may have thought the conspiracy did not go beyond the Schick case, but that is immaterial. In a case like this, it is enough that a convicted defendant knew he had connected himself with a criminal conspiracy, ***849** even though he was unaware of its full extent. A charge of engaging in a far-reaching conspiracy cannot be avoided by showing that what the accused conceived to be a limited conspiracy turned out to be a conspiracy of wider range, of which the supposed smaller one, in fact, was but a segment.

The conclusion of the jury as to Spector's connection with the conspiracy is greatly fortified by statements in the nature of a confession which were made by him after the final termination of the Schick case.

The decision of the court in Andrews' favor was handed down April 12, 1937, and in June of the same year Spector had a conversation with one Chaperau. Spector told Chaperau that he was going to Europe to dispose of some foreign rights in an electric razor. Spector showed him a letter of introduction from Judge Manton to someone in England. Chaperau gave Spector a letter to a London solicitor and Spector inquired with respect to the possibilities of raising capital and was informed by Chaperau that patents were not regarded favorably on the other side because of the fear that someone would infringe on them. Spector replied that there was nothing to worry about; that the Dictograph Company had secured the reversal by the Circuit Court of Appeals of an adverse decision in a lower federal court for which he, Spector was responsible. Spector said: 'I put the G . . . d . . . deal over all by myself. No one can infringe on us and the patent situation is an excellent one and if anyone were to go into business, they could put them out of business.'

In the light of the foregoing, there can be no doubt that the case was properly submitted to the jury.

[27] Second. But the conclusion would not be otherwise even if we reject the view that Spector was criminally connected with the general conspiracy and assume that the verdict cannot be sustained unless upon the theory that Spector was involved in a distinct and separate conspiracy; for the position which Spector takes on the basis of that assumption, to the effect that a fatal variance would then result between the allegations and the proof, is without merit. The trial judge was careful to tell the jury that they must confine themselves, in passing upon the question of Spector's guilt or innocence, to the evidence which related to him, without reference to that which related only to the defendant Manton; and that they were to limit their consideration to the facts of the Schick case with which the testimony connected Spector. Thus the attention of the jury was pointedly directed and confined to the specific facts relating to Spector.

If, then, the view be adopted that Spector was not a party to the general conspiracy alleged, the effect of the evidence would be to split the conspiracy, so far as Spector alone is concerned, into two: one, the general conspiracy; and the other, a smaller one, confined to the Schick case. Some of the circuit courts of appeals have held that this would constitute a fatal variance, but the Supreme Court in Berger v. United States, 295 U.S. 78, 81, 55 S.Ct. 629, 630, 79 L.Ed. 1314; rejected that concept, holding that it ignored the question of materiality and 'should be so qualified as to make the result of the variance depend upon whether it has substantially injured the defendant.'

In reality, the attack made upon the verdict is not that the evidence does not prove the smaller conspiracy but that it proves more. In the Berger case it was pointed out that the general rule in criminal cases in respect of variances is based upon the requirements (1) that the accused shall be informed of the charge against him so that he may not be taken by surprise and (2) that he may be protected against another prosecution for the same offence. 'The true inquiry, therefore,' the court said, 'is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused.' Certainly there has been no such variance in respect of Spector in the present case. The indictment is explicit in its allegations. It alleges in a separate paragraph the pendency of the appeal in the Schick case and that it was a part of the conspiracy alleged in the indictment that the co-conspirator Andrews 'would pay and cause to be paid, directly and indirectly, to the defendant George M. Spector, certain sums of money * * * to the defendant Martin T. Manton, directly and indirectly, and for his use and benefit through his interest in the Manton corporations as aforesaid, * * * ' The proof at the trial corresponds with ***850** allegations, so that the case is controlled by the language used by the Supreme Court in the Berger case: 'The proof here in respect of the conspiracy with which Berger (Spector) was not connected may, as to him, be regarded as incompetent; but we are unable to find anything in the facts * * * or in the record from which it reasonably can be said that the proof operated to prejudice his case, or that it came as a surprise; and certainly the fact that the proof disclosed two conspiracies instead of one, each within the words of the indictment, cannot prejudice his defense of former

acquittal of the one or former conviction of the other, if he should again be prosecuted.‘ (295 U.S.page 83, 55 S.Ct.page 631, 79 L.E. 1314.)

We have not been unmindful of other contentions made by both appellants; but we do not discuss them because either they have been sufficiently covered by what we have already said or they are so clearly without substance as to make a review of them unnecessary. After a careful consideration of the entire record, we find nothing to warrant a reversal of the judgments of the trial court and, accordingly, they are affirmed.

All Citations

107 F.2d 834

Footnotes

1 Sec. 88. ‘If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.‘
Sec. 241. ‘Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

2 ‘In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term ‘business’ shall include business, profession, occupation, and calling of every kind.‘

182 F.Supp. 18
United States District Court S.D. New York.

CHICAGO TITLE & TRUST COMPANY,
Complainant,
v.
FOX THEATRES CORPORATION, Defendant.
Application of Kenneth STEINREICH and Leopold Porrino, as Trustees of Assets which were of Fox Theatres Corporation, and on behalf of beneficiaries of their Trust, comprising creditors and stockholders of Fox Theatres Corporation, now known respectively as Preferred Participants and Participants of said Trust, Petitioners,
v.
CHASE NATIONAL BANK OF CITY OF NEW YORK et al., Respondents.

March 1, 1960.

Proceeding on petition to have an order approving a settlement entered into in an equity receivership set aside on ground such order was tainted with fraud and corruption, and on ground that the judge who entered the order was corruptly induced to sign it. Respondents moved to dismiss the petition. The District Court, Frederick van Pelt Bryan, J., held that where there were insufficient allegations of fact to support the petition, but serious charges were levied against the integrity of the court, and there were protracted hearings at which thousands of pages of testimony were taken, and judge against whom grave charges were made stood convicted of dishonest judicial conduct in another connection, and there was evidence lending support to the claim that in a later phase of the receivership the judge who entered the order was corruptly influenced, and charges of improper conduct made against receivers in the matter resulted in substantial settlements with them or their sureties, court, rather than dismissing the proceedings, finally would direct that petitioners file with the court a detailed statement of any actual proof which they might have showing that the order in question was brought about by corruption of the judge in question.

Order in accordance with opinion.

West Headnotes (15)

[1] **Receivers**
Discharge of receiver

Whether an equity receivership per se was terminated or not, a court had power to take evidence on question of corrupt conduct on the part of officers of the court, and if there was corruption, the court was under a duty to take whatever action might be appropriate to sustain its integrity and to undo any harm or injustice which resulted.

Cases that cite this headnote

[2] **Receivers**
Discharge of receiver

Where an equity receivership had been terminated for a number of years, the only purpose for which the court retained any powers over it was to determine whether there was any corrupt conduct on the part of officers of the court in regard thereto, and unless it was shown that officers of the court acted corruptly or fraudulently, and that in order to uphold the integrity of the court some action should be taken to rectify resulting wrongs or injustices, the court had no power or jurisdiction whatsoever over the receivership, nor could it entertain any applications made in regard to it.

1 Cases that cite this headnote

[3] **Receivers**
Collection of assets

A lapse of approximately 25 years prior to filing of a petition to set aside an order approving a settlement in an equity receivership, on ground a fraud was practiced on the court, together with the scope and wide ramifications of the transactions and the difficulties of defending adequately against charges a quarter of a century after the event, and intervening changes of status

and position all made it imperative that facts constituting corruption be clearly and specially alleged. Fed.Rules Civ.Proc. rule 9(b), 28 U.S.C.A.

1 Cases that cite this headnote

[4] **Receivers**
Collection of assets

Where a petition was filed to have a 1933 order approving a settlement in an equity receivership vacated and set aside on ground that fraud was practiced on the court, burden was on petitioners to allege facts in their petition showing that injustice or fraud resulted from corruption of officers of the court, and neither the fact that substantial sums were recovered for a trust estate set up as the result of the receivership proceedings, by way of settlement in certain unrelated proceedings, nor the fact that judge who signed the order in question was convicted of crime of obstructing justice in another connection, nor fact there were reasonable grounds to believe that corruption might have occurred in later phases of the receivership were substitutes for allegations of fact showing that fraud and corruption existed with respect to the order of settlement which petitioners sought to set aside. Fed.Rules Civ.Proc. rule 9(b), 28 U.S.C.A.

Cases that cite this headnote

[5] **Federal Civil Procedure**
Fraud, mistake and condition of mind

Rule of Civil Procedure providing that in all averments of fraud the circumstances constituting fraud be stated with particularity is a restatement of a long-standing rule at common law. Fed.Rules Civ.Proc. rule 9(b), 28 U.S.C.A.

1 Cases that cite this headnote

[6] **Federal Civil Procedure**
Fraud, mistake and condition of mind

Mere general allegations that there was fraud, corruption or conspiracy, or characterizations of acts or conduct in such terms are not enough to state a cause of action for fraud no matter how frequently repeated, nor do statements of malice, intent, knowledge and other conditions of mind, in general, substitute for particularization of the circumstances constituting the fraud charged, within the Rules of Civil Procedure. Fed.Rules Civ.Proc. rule 9(b), 28 U.S.C.A.

6 Cases that cite this headnote

[7] **Fraud**
Presumptions and burden of proof

Fraud cannot be presumed, but any presumption there may be is against it.

Cases that cite this headnote

[8] **Federal Civil Procedure**
Fraud, mistake and condition of mind

To state a cause of action for fraud, facts must be alleged which, if proven, would constitute fraud or would lead clearly to the conclusion that fraud has been committed. Fed.Rules Civ.Proc. rule 9(b), 28 U.S.C.A.

5 Cases that cite this headnote

[9] **Federal Civil Procedure**
Fraud, mistake and condition of mind

Requirement of alleging averments of fraud with particularity is strictly enforced when it is sought to impeach an order or decree of a court, especially one of long standing. Fed.Rules

Civ.Proc. rule 9(b), 28 U.S.C.A.

1 Cases that cite this headnote

[10] **Corporations and Business Organizations**
Appointment, qualification, and tenure

It was proper for a senior circuit judge, acting under a designation of himself as a district judge, to appoint as a coreceiver, the president of a large corporation which was being placed in equity receivership, and it was equally in order for him to appoint a coreceiver who was disinterested.

Cases that cite this headnote

[11] **Corporations and Business Organizations**
Collection of Assets in General

Allegations in a petition to have an order of settlement entered into in an equity receivership vacated and set aside on ground order approving the settlement was tainted with fraud and corruption and on ground that judge who signed the order was corruptly induced to sign it, to the effect that the judge inquired about certain negotiations involved between the corporation in receivership, and others, and that certain business and personal relationships between the judge who signed the order, and other persons, firms and corporations were not disclosed by the judge to creditors of corporation in receivership, were insufficient to show there was anything which should have been disclosed to the creditors, and were totally insufficient to show that judge who signed the order was disqualified from passing on the settlement.

Cases that cite this headnote

[12] **Federal Civil Procedure**
Power of Court
Federal Civil Procedure
Grounds and Factors
Federal Civil Procedure
Fraud; misconduct

A court has the inherent power to inquire into the integrity of its own judgments and to set them aside when fraud or corruption of its officers has been shown.

Cases that cite this headnote

[13] **Receivers**
Collection of assets

A petition in an equity receivership to set aside an order approving a settlement on ground it was tainted with fraud and corruption, and on ground that judge who signed the order was corruptly induced to sign it, was fatally defective where, accepting its allegations of fact as true, it failed to state facts showing, or from which it could be concluded, that the order in question was the result of fraud or corruption on the part of officers of the court.

Cases that cite this headnote

[14] **Receivers**
Collection of assets

Where there were insufficient allegations of fact to support petition to set aside an order approving a settlement entered into in an equity receivership, on ground that the judge who entered such order was corruptly induced to sign it, but serious charges were levied against the integrity of the court, and there were protracted hearings on the petition at which thousands of pages of testimony were taken, and judge against whom grave charges were made stood convicted of dishonest judicial conduct in another connection, and there was evidence lending support to the claim that in a later phase of the receivership the judge who entered the order was corruptly influenced, and charges of improper conduct made against receivers in the matter resulted in substantial settlements with

them or their sureties, court, rather than dismissing the proceedings, finally would direct that petitioners file with the court a detailed statement of any actual proof which they might have showing that the order in question was brought about by corruption of the judge in question.

1 Cases that cite this headnote

[15] **Corporations and Business Organizations**
Collection of Assets in General

D.C.N.Y. 1960 Properly construed settlement agreement approved in equity receivership of corporate guarantor contemplated unconditional allowance of claim on behalf of guarantees and not a mere guaranty to make up any difference between what guarantees might eventually realize in principal's reorganization and face amount due upon notes representing original debt; and even if aggregate of sums received on preferred stock issued to guarantees in reorganization proceeding totaled more than amount of notes, claim allowed in receivership would not be reconsidered and expunged. Bankr.Act, § 77B, 11 U.S.C.A. § 207.

Cases that cite this headnote

Attorneys and Law Firms

***20** Hirson & Bertini, New York City, for petitioners; Jay Leo Rothschild, David G. Haskins, Arnold A. Hackmyer, New York City, of counsel.

Robert Aronstein, New York City, for First Nat. Bank of Georgia, as Trustee, etc., a creditor.

Milbank, Tweed, Hope & Hadley, New York City, for respondents Chase Nat. Bank of City of New York and others, appearing specially for the purpose of making this motion; A. Donald MacKinnon, Janet P. Kane, New York City, of counsel.

Mudge, Stern, Baldwin & Todd, New York City, for respondents American Express Co., General Precision Equipment Corp. and National-Simplex-Bludworth, Inc.; Paul D. Miller, Leonard Garment, Bernard Nemtzow, New York City, of counsel.

Telsey & Lowenthal, New York City, for respondents Randforce Amusement Corp., Samuel Rinzler and Emanuel Frisch, as Executors under the Last Will and Testament of Louis Frisch, Deceased, and Rinfriss Corporation and Samuel Rinzler; Leon G. Telsey, New York City, of counsel.

Sherpick, Regan & Davis, New York City, for respondent Skouras Theatres Corp., appearing specially for the purpose of making this motion; William C. Woodson, New York City, of counsel.

Opinion

FREDERICK van PELT BRYAN, District Judge.

This application is in the nature of a summary proceeding in an equity receivership commenced in this court in early 1932. It is before me on motions by various of the respondents to dismiss the petition on a variety of grounds.

The first objective of the proceeding is to vacate and set aside an order made in the equity receivership on November 17, 1933 by the late Martin Manton, then the Senior Circuit Judge of the Circuit Court of Appeals of this Circuit, sitting in the District Court. That order authorized the then equity receivers, William E. Atkinson and John F. Sherman, ***21** to make a settlement of claims against various of the respondents named in the petition, and others, for the recovery of assets alleged to have been unlawfully transferred from the defendant Fox Theatres Corporation prior to the receivership, said to amount to more than $20,000,00. Many of these claims were the subject of a plenary action brought by the receivers against Fox Film Corporation, certain of the respondents, and others, in the New York State courts.

Petitioners charge that the order of November 17, 1933 approving the settlement was 'tainted with fraud and corruption' and that Judge Manton was corruptly induced to sign it to cover up extensive frauds which it is claimed that respondents had perpetrated upon Fox Theatres Corporation, its creditors and stockholders. Petitioners seek to have the order vacated and set aside and to have all steps and proceedings taken under it nullified. They also seek other far-reaching relief to which I will refer later.

Parties

On January 30, 1939 an order of Judge Manton was entered in this receivership confirming a plan proposed by the then equity receivers for the realization upon and liquidation of the assets of defendant Fox Theatres Corporation. The plan contemplated the creation of a trust to be administered and enforced by the Supreme Court, New York County, which was analogous in its functions to a corporation set up to realize upon and distribute the assets of a receivership estate. The realization plan was described by the court as one 'which would terminate the equity receivership, but which contemplates continuous liquidation of the corporate assets'.

Pursuant to the plan a deed of trust was executed as of February 24, 1939 for the benefit of the creditors and stockholders of defendant Fox Theatres. Trustees were duly designated by Judge Manton and the deed was duly filed with the County Clerk of New York County. All of the property and assets of the equity receivership and of Fox Theatres Corporation were transferred to and vested in the trustees under the deed of trust. Participating certificates were issued to the Fox creditors and stockholders entitled to share in the assets. Duly designated trustees have been carrying out the terms of the trust under the supervision of the New York Supreme Court ever since.

The petitioners in this proceeding are the present trustees under this deed of trust. They derive whatever status they may have to maintain the proceeding solely from their capacity as such trustees.

The more than thirty parties named in the petition as respondents include a banking corporation, eight other corporations, fifteen individuals, the erstwhile equity receiver in the Delaware Chancery Court of one of the corporations named, three persons named individually and as co-partners, and the executors of two decedents. A number of the respondents are the successors in interest of persons alleged to have participated in the transactions complained of.

The Relief Sought

The petition consists of fifty printed legal-sized pages containing ninety-seven separately numbered allegations, many of which are in turn sub-numbered. It is more than a little difficult to summarize its allegations. It is petitioners' theory that beginning in 1930 various of the named respondents, the predecessors in interest of other respondents, and many others named and unnamed, engaged in a vast and far-reaching conspiracy to milk Fox Theatres Corporation of assets worth many millions of dollars,' in derogation of the rights of its creditors and stockholders. The conspiracy is said to have culminated in this equity receivership and in the allegedly corrupt order of November 17, 1933 approving the settlement by the equity receivers of the claims to recover fraudulently transferred assets. It is claimed that the equity receivership was collusive, that the settlement made by the receivers was grossly and unconscionably inadquate ***22** and insufficient and that the order authorizing the settlement and its consummation was made as the result of the corruption of Judge Manton. Petitioners' counsel summarizes their position as follows:

'The conspiracy alleged was to denude Fox Theatres of its assets; to transfer them to the Respondents, and then, by a Court order authorizing the settlement, to regularize the despoliation.'

In addition to vacating and setting aside the order of November 17, 1933 authorizing the settlement and its consummation the petition also seeks (1) a declaration that all 'proceedings, transfers, releases, covenants not to sue, and other instruments and assurances of title', pursuant to or under the authority of such order, be declared void; (2) a decree requiring that the respondents, 'their assignees and transferees' account to petitioners for 'all properties, monies and other assets of Fox Theatres * * * received by them or on their behalf or for their account or coming into their possession, and to return, reassign, retransfer and redeliver same * * * or if same are no longer in their possession or susceptible of physical retransfer and redelivery * * *, then and in that event to pay to petitioners the fair monetary value thereof, together with the accumulations, profits and receipts therefrom'; (3) a judgment for 'such sums, damages, profits, interest, costs, disbursements and counsel fees' as are appropriate; (4) a judgment that all the respondents are guilty of contempt of this court and providing punishment therefor; and (5) items of ancillary relief.

The Issues Now Before the Court

This proceeding was commenced by the service on various of the respondents of an order to show cause made on December 9, 1954 and the accompanying petition. Respondents Chase National Bank, Bender, Van Kleeck and Aumack, individually and as co-partners doing business as Bender & Co., American Express Company, General Precision Equipment Corporation, National-Simplex-Bludworth Corporation, Inc., Skouras Theatres Corporation, Randforce Amusement Corporation, Rinfriss Corporation, Samuel Rinzler, and the executors under the will of Louis Frisch, deceased, appeared specially for the purpose of moving to dismiss the portions of the petition and order to show cause which sought to set aside the settlement order of Judge Manton of November 17, 1933. After conference with Chief Judge

Knox before whom all remaining matters in this receivership were then pending, a stipulation was entered into with the approval of the court, permitting the special appearance of these respondents for this limited purpose and reserving to them the right to answer the petition or to make other motions directed, among other things, (1) to the sufficiency of the petition generally, (2) the right of petitioners to proceed summarily rather than by plenary action, (3) the capacity of the petitioners to institute and maintain the proceeding, and (4) the jurisdiction of the court over the trust res. These respondents then made motions to dismiss the petition upon the grounds (1) that it failed to state facts upon which the order of November 17, 1933 could be set aside and declared void or facts showing that the order of any proceedings had pursuant thereto was the result of any fraud or misconduct on the part of officers of the court; (2) that the petition was barred by the time limitations of Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., since it was not made within a reasonable time and no facts were set forth justifying delay; (3) that petitioners were guilty of gross laches to the great prejudice of respondents; (4) as to some of the respondents that petitioners were precluded from the relief sought because they had made it impossible to restore the status quo ante; and (5) that there has been a prior binding adjudication of the underlying claims asserted in the petition.

Petitioners then sought an order to show cause bringing on motions by them to strike the special appearances filed by ***23** the moving respondents, to 'dismiss' their motions to dismiss the petition, to compel them to answer the petition, and for other relief. That order to show cause was never signed. Some time thereafter this matter was assigned to me for all purposes. At a conference of counsel before me it was determined that the court would hear and determine the issues of law (1) as to whether the petition failed to allege facts showing that the order of November 17, 1933 under attack, and proceedings taken thereunder, were the result of any fraud or corruption on the part of officers of this court, and (2) as to whether any defenses of laches might be available to the respondents under the circumstances. All other questions raised by respondents' motions to dismiss were reserved for future determination if that should be necessary.

These are the only issues before me at this point.

The History and Background of This Equity Receivership

The questions raised must be viewed against the background of the long and troublesome history of this hoary equity receivership. Much of this background is murky. Some of it is obscure. And almost all of it is replete with complications. The key events with which this proceeding is concerned took place more than a quarter of a century ago.

In June 1932, when this receivership commenced, Judge Manton was Senior Circuit Judge of the Circuit Court of Appeals of this Circuit. At that time there was, as the Supreme Court said in Johnson v. Manhattan Ry. Co., 289 U.S. 479, 483, 53 S.Ct. 721, 723, 77 L.Ed. 1331:

'An acute controversy between the Senior Circuit Judge of the Second Circuit and the District Judges of the Southern District of New York respecting the authority of a judge specially assigned to that district— particularly the Senior Circuit Judge when so assigned— to entertain an application for the appointment of receivers in a suit in equity.'

In so far as that controversy affected the present equity receivership the Supreme Court said, 289 U.S. at pages 483-484, 53 S.Ct. at page 723:

'In 1930 the Senior Circuit Judge, acting under 28 U.S.C. § 22, and reciting that the public interest required it, assigned himself to hold at any time a session or sessions of the District Court for that district, for the purpose of trying causes and entertaining and disposing of any matter which might come before him.

'In June, 1932, at the suggestion of counsel in an intended suit in equity for the appointment of receivers for the Fox Theatres Corporation, the Senior Circuit Judge sought informally to persuade one or more of the District Judges that a trust company ought not to be selected as receiver, but failed to secure an acceptance of his view. Thereupon, acting under his assignment of 1930, he entertained the application for a receiver and appointed individual receivers.'

The controversy between Judge Manton and the District Judges had arisen primarily over the practice of the District Judges in not infrequently selecting as an equity receiver the trust company which was designated by District Court Rules as a standing receiver in bankruptcy cases.

The Johnson case did not involve this receivership but another equity receivership involving the Interborough Rapid Transit Company, one of the principal transit facilities in the City of New York. Equity receivers had been appointed by Judge Manton in that case after he had assigned himself to hold a District Court for the Southern District of New York. His action in so doing was collaterally attacked. The Supreme Court held that the Senior Circuit Judge had the power so to assign himself and to appoint receivers in the suit in equity. However,

the court said that Judge Manton had acted 'hastily and evidently with questionable wisdom' and that his action ***24** had embarrassed and was continuing to embarrass the receivership. The court suggested that it would be the part of wisdom for him to withdraw from further participation in the receivership proceedings under the circumstances. Thereafter Judge Manton withdrew from the Interborough case.

However, no question appears to have been raised in this receivership as to the propriety of its being before Judge Manton or as to his power to appoint the receivers, and he continued to handle it until his resignation from the bench in 1939.

On June 22, 1932 Judge Manton appointed as temporary receivers William E. Atkinson, President of defendant Fox Theatres, and John F. Sherman, who appears to have had no connection with the defendant, any of the respondents, or any of the transactions alleged to have taken place prior to his appointment.[1] On July 12, 1933 their appointment was made permanent. The order appointing permanent receivers directed them to institute such actions as were necessary to protect the trust estate.

On June 30, 1933 the receivers commenced an action in the New York Supreme Court against Fox Film Corporation and others. They named as defendants in that action all but seven of the respondents, or the predecessors in interest of the respondents, named in the petition now before me though it does not appear how many of them were actually served. In August of that year the original complaint was discontinued by stipulation and an omnibus complaint in a similar action of broader scope was prepared by the receivers.

One of the defendants named was Daniel O. Hastings, who, on February 29, 1932, had been appointed by the Chancery Court of Delaware as receiver of the property and assets of General Theatres Equipment Co., Inc., which then held voting control of Fox Film Corporation. Three other complaints against Fox Film Corporation alone were also prepared by the receivers.
The various actions commenced or contemplated by the receivers, Atkinson and Sherman, embraced a substantial portion of the transactions which are alleged in the petition now before me to be part of the conspiracy to milk Fox Theatres Corporation of its assets by means of fraudulent transfers and preferences. Chase Bank, Chase Securities, Fox Film and General Theatres were alleged to have been principal actors in this series of transactions designed to divert assets from Fox Theatres, it being alleged that Chase Bank and Chase Securities, under the domination of Albert H. Wiggin, Chairman of Chase Bank, controlled General Theatres and Fox Film as well as Fox Theatres.[2]

***25** Archibald R. Watson, who had been appointed as attorney and solicitor for the receivers, and his partner Wilguss, instituted the litigation on the receivers' behalf. After negotiations between the receivers and their counsel, Hastings, as receiver of General Theatres, the attorneys for Fox Film Corporation, and others, a settlement was agreed upon.

Under the terms of the proposed settlement the receivers of Fox Theatres were paid the sum of $500,000 in cash and received 2,500 shares of the capital stock of William Fox Isis Investment Co. which owned the Fox Isis Theatre in Denver, Colorado, which had previously been given by Fox Theatres to Fox Film as collateral security for an indebtedness. This stock was valued at some $330,000. Claims of approximately $4,000,000 filed against the Fox Theatres Corporation in receivership by defendants in the action, their subsidiaries, or persons whom they controlled, were withdrawn and released. Various releases were mutually exchanged and among those so released were Fox Film, General Theatres and its receiver, National Theatres Equipment, Chase Bank and Chase Securities Corporation. In addition it was provided that Hastings, as receiver of General Theatres, should transfer to Fox Film substantially all the stock of Movietone News, Inc. held by him, which represented fifty percent of the outstanding stock of that company, together with certain notes of Movietone News, in part payment of certain claims.

On or about October 24, 1933 Hastings, as receiver of General Theatres, filed a petition in the Delaware Chancery Court setting forth the terms of the proposed settlement and asking authority to consummate it. Full notice of this petition was given to all stockholders and creditors of General Theatres and was published in New York and other newspapers. On November 17, 1933 Hastings was authorized by the Delaware Chancellor to consummate the settlement.

On November 15, 1933 Watson, counsel for Atkinson and Sherman as receivers, served on the attorneys for the plaintiff in this receivership, the attorneys for the defendant, attorneys for Fox Film, and the attorneys for William Fox and Ben Leo, creditors who had appeared, notice of an application returnable November 17, 1933 for an order approving the settlement. It appears that this notice was served on all parties and intervenors in the Fox Theatres equity receivership though no notice was given to creditors generally. The petition on the application, prepared by counsel for the receivers, set forth in some detail the various claims of Fox Theatres against the defendants named in the omnibus complaint, discussed

and commented upon them and gave, in summary form, the terms of the proposed settlement.

On November 17 a hearing was held before Judge Manton on the receivers' application for approval of the settlement. One creditor of Fox Theatres appeared at the hearing and objected to the proposed settlement though on what grounds does not appear. Judge Manton then signed the order dated November 17, 1933 approving the settlement as proposed and authorizing its consummation. Thereafter the settlement was consummated. This is the order which the petitioners here seek to set aside as tainted with fraud and corruption.

On December 4 and 5, 1933, some three weeks after the entry of the order under attack, Atkinson and Sherman, as receivers, and Watson, their attorney, filed separate applications for allowances for services through November 1933. These petitions referred in considerable detail to the settlement and its terms. On January 4, 1934, less than seven weeks after the order of November 17 had been entered, a hearing was held before Judge Manton on the report of the receivers for the preceding six months, recommending that the business of Fox Theatres be continued for another six months. Notice of this hearing was served by mail on all known creditors and was duly published. The receivers' report discussed at some length the terms of the settlement which had been approved by Judge Manton and the Delaware ***26** Chancellor on November 17, 1933. There is no doubt that the creditors of Fox Theatres were thoroughly familiar with the fact that the settlement had been approved and consummated for there are numerous references to the settlement and its terms in various petitions and applications filed during the course of the receivership.

On February 25, 1934 John F. Sherman died and was succeeded as co-receiver by Milton C. Weisman on August 16, 1934. On September 18, 1934 Atkinson resigned as co-receiver and Weisman continued as sole receiver. On September 28, 1934 Watson, who had been counsel for the receivers since the inception of the proceedings, resigned and was succeeded by Basil O'Connor.

In December 1938 Weisman, as sole receiver, filed with the court the plan for realization upon and liquidation of the assets of Fox Theatres Corporation to which I have previously referred. After a hearing was held on the plan on notice to all of the creditors it was duly approved on January 30, 1939, and Weisman and Kenneth Steinreich, one of the present petitioners, were appointed as trustees. As I have indicated, the plan provided for a realization and liquidation trust to be administered by the Supreme Court, New York County, and all of the assets and property of the receivership and of Fox Theatres was turned over to this trust which has since been administered by the state court.

In the meantime, in the summer of 1938 an investigation was commenced of the judicial activities of Judge Manton, and in February of 1939, shortly after the approval of the Fox realization plan, Judge Manton resigned. On June 6, 1939 Judge Manton was indicted for conspiracy to obstruct the administration of justice and to defraud the United States, and thereafter was convicted. See United States v. Manton, 2 Cir., 107 F.2d 834. It may be noted that none of the persons who were indicted with Judge Manton were in any way involved in the present proceeding and the matters alleged in the indictment bore no relation to the Fox Theatres receivership or anything involved therein.

In April 1939 Weisman, the then receiver of Fox Theatres, and Atkinson, on behalf of himself and his deceased coreceiver Sherman, filed final accounts in this court. Objections were filed to the accounts by a stockholders committee and by Robert Aronstein, as attorney for the Trust Company of Georgia as trustee, one of the creditors. Judge Knox, to whom by then the receivership had been assigned for all purposes, referred the objections to Nathan A. Smyth as Special Master to hear and report. The objections to the receivers' accounts filed by Mr. Aronstein attacked, among other things, the settlement approved by the order of November 17, 1933 upon grounds similar to those which are raised here.

At about the same time Judge Knox requested the then United States Attorney, John T. Cahill, to make an investigation of the Fox Theatres receivership. Aronstein was permitted to cooperate. By August 30, 1940, an indictment had been filed by a Grand Jury in this court against George B. Skouras, Harvey P. Newins, one of the respondents in this proceeding, Skouras Theatres Corporation, another of the respondents, and Ktima Corporation, charging a conspiracy to bribe Judge Manton in connection with an order of January 12, 1937, entered in the receivership which approved the sale of the capital stock of William Fox Realty Corporation, a wholly owned subsidiary of the defendant, together with a lease of the Academy of Music Theatre, to Skouras Theatres Corporation. This order had been entered upon the application of Weisman, as receiver, over the objections of a Fox Theatres stockholders committee.

On the basis of the information set forth in the Skouras-Newins indictment and other information obtained through the investigation made by the United States Attorney, Aronstein, representing the Trust Company of Georgia, applied in March 1941 to set aside

the order of January 12, 1937 which had approved the ***27** sale to Skouras Theatres Corporation. After extended negotiations, on June 27, 1944 an order was entered approving a settlement under which the property conveyed to Skouras Theatres Corporation pursuant to the order of January 12, 1937, was returned to the Fox realization trustees. The indictment returned against Skouras, Newins and the two corporations arising out of this transaction was never brought to trial.

During the course of 1944 the United States Attorney filed with Judge Knox a memorandum as to his results of investigations of the Fox Theatres receivership. This memorandum dealt primarily with the course of the receivership subsequent to the time when the receivership of Atkinson and Sherman had been terminated. It indicated that no evidence of impropriety had been uncovered in the course of the investigation with respect to the earlier phases of the receivership or with respect to the order of November 17, 1933, though the investigation had not been directed to those phases of the matter.

On November 27, 1945 an order was entered on application of Aronstein approving a settlement for $40,000 of the objections raised on behalf of the Fox Theatres trustees to the accounts of Weisman as receiver. Weisman's accounts as receiver were thereupon approved and Weisman and his surety were discharged. Thereafter on March 19, 1946 a settlement in the sum of $35,000 with the sureties on the bonds of Atkinson and Sherman as receivers, Atkinson having also died in the meantime, was approved by Judge Knox. The accounts of Atkinson and Weisman were then approved and they and their sureties were discharged.

On May 1, 1946 Judge Knox, on the application of Aronstein, entered an order enlarging and extending the scope of the hearings theretofore authorized before Mr. Smyth as Special Master, 'to hear evidence and take testimony concerning all transactions had by the receivers herein respecting or pertaining to the assets of Fox Theatres Corporation and its subsidiary and affiliated corporations'. The order further provided that Aronstein was authorized to present evidence before the Special Master. Continuation of the hearings before the Special Master was authorized by Judge Knox on May 7, 1952. On May 6, 1957, shortly after this matter was assigned to me, I signed an order appointing a new Special Master to succeed Mr. Smyth, who had died, and authorizing further continuation of the hearings before him.

Aronstein, representing the Trust Company of Georgia as creditor, assisted by counsel for the trustees of the realization and liquidation plan, has been presenting evidence before the Special Master over a period of some ten years. According to the petitioners scores of witnesses have been examined, over ten thousand pages of testimony have been taken, there are hundreds of exhibits and thousands of pages of records in various actions and proceedings in other courts have been examined. On November 27, 1950, after negotiations between Aronstein and counsel for Twentieth Century Fox Film Corporation, successor to Fox Film Corporation, a settlement was agreed upon of all claims between Fox Theatres and these corporations. The settlement was approved by an order entered by Judge Knox on November 27, 1950. It was predicated upon claims that Fox Film Corporation and other parties had been participants in the same conspiracy alleged in the present petition which is claimed to have led to the settlement approved by Judge Manton's order of November 17, 1933. Under the terms of this settlement Twentieth Century Fox paid the sum of $200,000 to the trustees of the Fox realization trust. Twentieth Century Fox, its predecessor corporations, and a number of the alleged co-conspirators, who are alleged to have participated in the transactions alleged in the petition now before me, were released by the trustees. However, the trustees expressly reserved their rights against the respondents named in their present petition.

***28** The present petition was filed in December 1954, more than four years later.

The Present Posture of the Receivership

I have given no more than an outline of some of the salient facts in the long history of this receivership, stretching as it does over more than a quarter of a century. The facts to which I have referred have been culled from an enormous record and are merely in capsule form. However, an understanding of these facts, at least, is essential since they bear on the present posture of this receivership and the very limited purposes for which it remains open in this court. They also indicate the setting in which the petition and the questions now raised with respect to it must be viewed.

The present posture of the equity receivership in this court may be summarized as follows:

All of its assets have been vested for twenty years in the trustees of the realization trust under the jurisdiction of the Supreme Court, New York County. During that period the trustees have been functioning and carrying out their duties under the trust indenture. The trustees are not officers of this court. None of the assets vested in them have been in the possession, custody or control of this court and its officers since the plan for realization and liquidation was consummated.

Any questions concerning the consummation and the execution of the plan have long since been disposed of and the successive equity receivers have been fully released and discharged for over ten years. While the equity receivership in one sense remains open in this court the purposes for which it remains open are severely limited. When Judge Knox designated a special master to hear evidence in connection with transactions of the receiver, he did not retain jurisdiction over the equity receivership per se. He was merely exercising a power inherent in the court to ferret out and rectify frauds committed upon it through the corruption of its own officers. This power was exercised subsequent to the consummation of the plan for realization and liquidation only because of questions raised as to the conduct of officers of the court during the course of the receivership itself.

The orders of Judge Knox authorizing the taking of testimony before the special master and the presentation of such testimony by Aronstein representing creditors, did not reopen generally the terminated receivership proceeding nor in any way impair or vitiate the consummated realization plan. The plan remained in full force and effect and the receivership remained terminated except in so far as steps were being taken to discover whether there was any evidence of corrupt conduct on the part of officers of the court, and particularly of Judge Manton, in relation to this receivership.

[1] There is no doubt about the power of the court to do this whether the equity receivership per se was terminated or not. Indeed, if there was such corruption the court is under a duty to take whatever action may be appropriate to sustain its integrity and to undo any harm or injustice which has resulted. See Root Refining Co. v. Universal Oil Products Co., 3 Cir., 169 F.2d 514; Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250.

[2] But this is the only purpose for which this court retains any powers over this long since terminated receivership. Unless it is shown that its officers have acted corruptly or fraudulently and that in order to uphold the integrity of the court some action should be taken to rectify resulting wrongs or injustices, this court has no power or jurisdiction whatsoever over the receivership nor may it entertain any applications made in it.[3]

***29** Thus, the question now presented as to whether the petition states facts sufficient to show that the order of Judge Manton of November 17, 1933 was brought about by the corruption of officers of the court goes to the heart not only of the petitioners' right to relief but also of the power of this court to entertain a summary application of this nature at all.

The Nature of the Present Proceeding

No facts had been presented to the court prior to the filing of the present petition showing that the order of November 17, 1933 was the result of corrupt conduct of its officers. Up to that point there were only the suspicions which had been voiced by Aronstein and his associates.

The question now presented is whether the petition filed shows that such facts, as distinguished from mere suspicion or conjecture actually exist.

This is not a proceeding which the court has already authorized as petitioners' counsel seem to think. Even less is it a proceeding brought by the court on its own motion. It is not 'the adversary portion of the investigation ordered by this court in May 1939', nor is it part of 'an investigatory and punitive proceeding conducted by the court itself', as counsel for the petitioners have claimed it to be.

This is an adversary proceeding brought by private litigants, the petitioner-trustees, who seek to set aside the order of November 17, 1933 in order to recover large sums for the benefit of the creditors and stockholders whom they represent. The action taken by the court thus far has in no way set the seal of its approval upon this proceeding, nor have petitioners' counsel been designated as officers of the court for the purpose of prosecuting it.

The only action which the court has thus far taken is to permit Mr. Aronstein, as counsel for an interested creditor, to present testimony before a special master regarding the acts and proceedings of the receivers in an effort to ascertain what facts, if any, exist to support suspicions that there may have been corruption of officers of this court. The order of Judge Knox of May 1, 1946 enlarging the scope of the hearings before the special master, which had previously been confined to hearing testimony on the objections to the accounts of the receivers, provided that 'evidence upon said hearing may be presented by Robert Aronstein, Esq. as attorney for First National Bank of Atlanta, Georgia, or any other of the parties herein'. It directed that the expenses of the hearing, including the fees of the special master, should be a charge upon and paid out of the assets of the Fox realization trust but that 'any counsel fees shall be contingent upon and allowed and paid only out of any assets which are hereafter recovered and shall be in such amounts as may be ordered by this court'. My order of May 6, 1957 appointing a new special master did not enlarge the scope of Judge Knox's previous order.

Having presented evidence before the special master for some eight and a half years after the entry of Judge Knox's order, Aronstein and the petitioners now must make a proper showing that the order of November 17, 1933 was brought about by the corruption or fraud of officers of the court before they can be permitted to maintain such a proceeding as this. Far from it making no difference 'what the petition states', as petitioners have claimed, whether or not its allegations are sufficient makes every difference.

[3] [4] The long lapse of time since the transactions with which the petition is concerned took place, the enormous scope and wide ramifications of such transactions and the difficulties of defending adequately against charges a ***30** quarter of a century after the event, and intervening changes of status and position, all make it imperative that facts constituting corruption be clearly and specially alleged. Neither the fact that, through Aronstein's efforts, substantial sums were recovered for the estate by way of settlement in other unrelated proceedings, nor the fact that Judge Manton was convicted of the crime of obstructing justice in quite another connection, nor the fact that there were reasonable grounds to believe that corruption may have occurred in later phases of this receivership, are substitutes for allegations of fact showing that fraud and corruption existed with respect to the specific order of settlement signed by Judge Manton on November 17, 1933 which is sought to be set aside. This is the foundation upon which all else rests and unless such foundation is firm and sound the whole structure erected by the petitioners must fall.

The many underlying transactions alleged in the petition to be part of a grandiose conspiracy are exceedingly complex. They relate to complicated intercorporate and financial dealings which took place in the midst of the depression of the early 1930's. They involve numerous persons and corporations in addition to the thirty-odd named as respondents. The relationship of one transaction to another and of the various actors to one another in unclear.

Plainly an enormous burden will be placed on the respondents if they are required to go to trial on these charges. Such a trial would entail large expenditures of money, time and effort. The mere lapse of time and the intervening deaths of many if not most of the persons who are alleged to have participated in these transactions would make the task exceedingly difficult. Moreover, a number of the respondents are merely the successors in interest to the original participants and there have been many intervening changes in status, corporate and otherwise.

Quite apart from any questions of laches on the part of the petitioners and to respondents' prejudice, it would be unjust to require respondents to undertake a full scale defense against the allegations of the petition unless it has been shown that there are sound grounds upon which it can be maintained.

This court will not shrink from putting respondents to their defense if it is shown that injustice or fraud resulted from the corruption of its officers. But the burden is on the petitioners to make such a showing in their petition.

The Tests Which the Petition Must Meet

As the Supreme Court said in Stearns v. Page, 48 U.S. 819, at page 829, 12 L.Ed. 928, a leading case in this field, where the court refused to set aside an order made twenty-six years before on the ground that fraud had been practiced on the court:

'* * * But as lapse of time necessarily obscures the truth and destroys the evidence of past transactions, courts of chancery will exercise great caution in sustaining bills which seek to disturb them. They will hold the complainant to stringent rules of pleading and evidence, and require him to make out a clear case. Charges of fraud are easily made, and lapse of time affords no reason for relaxing the rules of evidence or treating mere suspicion as proof. If a defendant can be compelled to open settled accounts, to explain or prove each item, after a lapse of near thirty years, by general allegations of fraud,— if the fraud can be proved by his inability to elucidate past transactions after so great a length of time, or by showing some slips of recollection or by contradicting him in some collateral facts by the frail recollection of other witnesses— no man's property or reputation would be safe.'

In United States v. Throckmorton, 98 U.S. 61, at page 64, 25 L.Ed. 93, in affirming a dismissal on demurrer of a petition attacking a decree twenty years ***31** after it was rendered, the court, emphasizing the lapse of time, said:

'But we think these are good reasons why a bill which seeks under these circumstances to annul a decree thus surrounded by every presumption which should give it support, shall present on its face a clear and unquestionable ground on which the jurisdiction it invokes can rest.'

[5] Quite apart from lapse of time or intervening circumstances, it is settled at common law and provided by the Rules of Civil Procedure that circumstances constituting fraud must be alleged with particularity. Rule 9(b) of the Federal Rules of Civil Procedure provides:

'In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.'

This is a restatement of the long standing rule at common law. See Stearns v. Page, supra; United States v. Throckmorton, supra; Chamberlain Machine Works v. United States, 270 U.S. 347, 46 S.Ct. 225, 70 L.Ed. 619; Zaring v. Strauss & Co., 9 Cir., 30 F.2d 313; Barnes v. Boyd, D.C.S.D.W.Va, 8 F.Supp. 584, affirmed 4 Cir., 73 F.2d 910, certiorari denied 294 U.S. 723, 55 S.Ct. 550, 79 L.Ed. 1254; 2 Moore, Federal Practice, (2d edition), p. 1907.

[6] Mere general allegations that there was fraud, corruption or conspiracy or characterizations of acts or conduct in these terms are not enough no matter how frequently repeated. Aetna Casualty & Surety Co. v. Abbott, 4 Cir., 130 F.2d 40; Voliva v. Bennett, 5 Cir., 201 F.2d 434; Curacao Trading Co. v. William Stake & Co., D.C.S.D.N.Y., 2 F.R.D. 308; Martin v. Clayton, D.C.S.D.N.Y., 6 F.R.D. 214. Nor do statements of 'malice, intent, knowledge, and other condition of mind' in general terms under the last sentence of Rule 9(b) substitute for particularization of the circumstances constituting the fraud charged. See United States v. Hartmann, D.C.E.D.Pa., 2 F.R.D. 477.

As the Supreme Court said in Chamberlain Machine Works v. United States, supra, 270 U.S. at page 349, 46 S.Ct. at page 226:

'The general allegations of 'fraud' and 'coercion' were mere conclusions of the pleader, and were not admitted by the demurrer. * * * To show a cause of action it was necessary that the petition state distinctly the particular acts of fraud and coercion relied on, specifying by whom and in what manner they were perpetrated, with such definiteness and reasonable certainty that the court might see that, if proved, they would warrant the setting aside of the settlement.'

See, also, Stearns v. Page, supra; Schultz v. Manufacturers & Traders Trust Co., D.C.W.D.N.Y., 1 F.R.D. 53; In re Burton Coal Co., D.C.N.D.Ill., 57 F.Supp. 361, affirmed 7 Cir., 126 F.2d 447, 449.

[7] [8] Fraud cannot be presumed, (United States v. Wunderlich, 342 U.S. 98, 100, 72 S.Ct. 154, 96 L.Ed. 113; United States v. Colorado Anthracite Co., 225 U.S. 219, 226, 32 S.Ct. 617, 56 L.Ed. 1063), and, indeed, any presumption there may be is against it. Prevost v. Gratz, 19 U.S. 481, 5 L.Ed. 311. Facts must be alleged which, if proven, would constitute fraud or which lead clearly to the conclusion that fraud has been committed. Barnes v. Boyd, supra.

[9] These requirements are strictly enforced when it is sought to impeach an order or decree of the court, especially one of such long standing as the order under attack here. Stearns v. Page, supra; McCampbell v. Warrich Corp., 7 Cir., 109 F.2d 115, certiorari denied 310 U.S. 631, 60 S.Ct. 1077, 84 L.Ed. 1401; Davis v. State Bank of Woodstock, 7 Cir., 151 F.2d 180; Barnes v. Boyd, supra; In re Burton Coal Co., supra.

The portions of the petition which purport to show that the order of November 17, 1933 is tainted with fraud and corruption must meet these tests. They are ***32** not the less applicable because the fraud and corruption charged is that of the court's own officers.

This charge as to the order of November 17, 1933 is the keystone of the petitioners' case as petitioners themselves recognize. Any rights they might have to assert underlying claims embraced in the plenary actions brought by the receivers which were settled pursuant to the order of November 17, 1933 are entirely dependent upon first setting aside the order and the settlement which it approved. That in turn is dependent on whether their petition has sufficiently alleged that fraud and corruption was committed by officers of this court with respect to that order.

The Allegations of the Petition as to Corruption with Respect to the November 17, 1933 Order

An analysis of the rather confusing and obscure allegations of the petition makes it plain that it does not state facts which show, or from which the conclusion can be drawn, that the order of November 17, 1933 was the result of fraud or corruption on the part of officers of the court.

(1)

First it should be noted that while the petitioners make certain allegations with respect to the institution of this equity receivership and the appointment of the receivers by Judge Manton, they do not seek to set aside anything which was done in the course of the receivership other than the order of November 17, 1933 and the settlement it approved. Indeed, the only status petitioners may have to maintain this proceeding as trustees of the Fox realization trust is dependent upon the receivership and orders issued by Judge Manton in the course of it. It was Judge Manton who approved the plan of liquidation under which the realization trust was set up and who designated the original trustees, one of whom is a petitioner here.

Thus, this is not an attack on the entire receivership proceeding ab initio nor an attempt to unscramble all that has been done in it over a period of twenty-five or more years. The allegations as to the institution of the receivership and the appointment of the receivers are of significance only in so far as they bear on the fraudulent and corrupt conduct charged with respect to the November 1933 order.

(2)

The first time it is claimed that Judge Manton came into the picture is in June of 1932. It is alleged in substance that Harry Kosch, who on May 18, 1932 had been appointed receiver of Roxy Theatres Corporation, which had some affiliations with Fox Theatres, by another judge of this court, after conferring with Atkinson, the newly elected president of Fox Theatres, procured the services of one Newins 'who was then friendly or engaged in business transactions' with Manton to arrange for a conference with reference to the appointment of a receiver and attorneys for the receiver of Fox Theatres. Newins is alleged to have arranged for such a conference at which it was 'agreed' that Manton would 'designate himself' as a District Judge to take jurisdiction of the application and appoint Atkinson as sole receiver and an attorney for him. Newins is not alleged to have been present at the conference, nor to have done anything other than to 'arrange' it. All this is characterized as 'irregular, unlawful and corrupt' and 'based upon an illegal consideration' and for the 'purpose' of having a friendly receiver appointed to block any actions for fraud against respondents.

It is then alleged that Manton designated himself as District Judge, assumed jurisdiction and appointed Atkinson as receiver and John F. Sherman as co-receiver. It may be noted Atkinson was not appointed sole receiver as had allegedly been arranged, but a co-receiver was appointed who is not alleged to have had any connection with the 'conspiracy' or with any of the respondents. However, he is alleged to have been 'a close friend and business associate of a trusted friend and benefactor of said Manton'. Though the petition makes no reference to the ***33** fact, Archibald Watson, a well known member of the New York bar was appointed attorney for the receivers.

This is all that is said about the initial stages of the receivership. Stripped of adjectives, characterizations and conclusions none of these allegations show any fraud or corruption on the part of Manton or the receivers either bearing on the order of November 17, 1933 or otherwise.

The allegations as to Manton's designation of himself as a District Judge for the purpose of taking jurisdiction over the receivership are of course inaccurate. As the Supreme Court pointed out in Johnson v. Manhattan Ry. Co., supra, 289 U.S. at page 484, 53 S.Ct. 721, Manton was acting under a designation of himself as District Judge which had been made in 1930. But apart from this it is plain that such designation and assignment by Senior Circuit Judges was a common and long standing practice in all circuits but one, and fully within their powers. Johnson v. Manhattan Ry. Co., supra. There is nothing in such an assignment on which to predicate a charge of fraud or corruption.

[10] It was entirely in order for Manton to appoint as one of the co-receivers the president of the large enterprise which was being placed in receivership. It was equally in order for him to appoint a co-receiver who, as far as appears from the petition was disinterested. There is nothing improper in a 'friendly' receivership. These are common and long accepted practices which have been followed not only in equity receiverships but in proceedings under Section 77b and Chapter 10 of the Bankruptcy Act, 11 U.S.C.A. § 501 et seq. See In re Metropolitan Ry. Receivership, 208 U.S. 90, 28 S.Ct. 219, 52 L.Ed. 403; Kingsport Press v. Brief English Systems, 2 Cir., 54 F.2d 497, certiorari denied sub nom. Owen v. Kingsport Press, Inc., 286 U.S. 545, 52 S.Ct. 497, 76 L.Ed. 1282; Guaranty Trust Co. v. International Steam Pump Co., 2 Cir., 231 F. 594, certiorari denied sub nom. Lewis v. International Steam Pump Co., 241 U.S. 676, 36 S.Ct. 725, 60 L.Ed. 1232; Lincoln Printing Co. v. Middle West Utilities Co., D.C.N.D.Ill., 6 F.Supp. 663, affirmed 7 Cir., 74 F.2d 779, certiorari denied sub nom. Pollak v. McCulloch, 295 U.S. 746, 55 S.Ct. 659, 79 L.Ed. 1691.

The fact that Kosch, a receiver appointed by this court, talked to Manton about the appointment of receivers for a company in which his receivership estate had some interest, is certainly not even a remote indication of fraud or corruption on the part of anybody. The allegation that Sherman was a friend of 'a trusted friend and benefactor' of Manton, accepted as true, adds nothing. Quite apart from the fact that the 'trusted friend and benefactor' is not named or again referred to anywhere in the petition, there is nothing to show that he had anything to do with anybody else in the case or the slightest connection with the respondents or the alleged conspiracy. Plainly a judge would be unlikely to appoint a co-receiver who was unknown to him.

Then there is the allegation that Newins, who is alleged to have 'arranged' but not participated in the conference between Kosch and Manton, was hired by Kosch in the Roxy receivership, by Atkinson in the Fox Theatres receivership and 'subsequently' was placed on the payroll

of Skouras Theatres and that the Fox receivers paid Newins his 'emolument' of some $400 and later $200 per week by check, 'many of which checks were cashed by Kosch as receiver of Roxy'. The hiring of Newins by Atkinson is alleged to have been 'as a reward to Newins and any other persons with whom Newins might share said reward'.

This is a prime example of the petitioners' attempts to establish fraud by innuendo rather than by allegations of fact. The petition is replete with matter of this character. Newins' escutcheon is now tarnished because of his connection with the Skouras Theatres-Academy of Music sale in this same receivership in 1937, four or more years after the events alleged here and his indictment for his part in that transaction. Manton ***34** is discredited by his later conviction, his connection with the Skouras deal and other transactions. Skouras Theatres was the moving factor in the Academy of Music deal and appears to have been involved in bribery of Manton in that connection. None of these matters are claimed to have anything to do with the transactions involved in this proceeding. Yet petitioners' language leaves the subtle suggestion that corruption here should be implied because of the blemished reputations of Newins, Manton and Skouras in quite different connections.

The references to 'any other persons with whom Newins might share the 'reward '', to the fact that Kosch cashed Newins' checks and to employment of Newins by Skouras at some later unspecified date emphasize the wisdom of requiring that specific facts showing fraud must be stated.

There is nothing in the allegations thus far discussed to show or lead to the conclusion that there was any fraud or corruption on the part of anybody.

(3)

[11] We now turn to the only allegations regarding the settlement and the signing of the order approving it, the key point of petitioners' case. Instead of alleging concrete facts the allegations become even weaker.

It is alleged that Manton suggested to Archibald Watson, the solicitor for the receivers, whose integrity is not questioned, that before serving a complaint against Fox Film he confer with Kent, president of Fox, and that Kent and Manton 'were known to each other either directly or through common friends or business associates'. Then Manton is alleged to have asked the co-receiver Sherman what he knew concerning the settlement negotiations. Sherman is said to have explained the details to Manton and also explained that Senator Hastings, the Delaware Chancery receiver of General Theatres, had called on the receivers' 'Special Counsel unsolicited at the suggestion of someone he met in Chicago who knew of said Special Counsel's identity with the receivership and of the suggestion by said Special Counsel to Hastings that he call on the solicitor for the receivers of Fox Theatres Corporation'.

How any of these facts tend to show corruption of Manton is beyond me. Manton had every right to inquire about the negotiations. See In re Nevitt, 8 Cir., 117 F. 448. The Delaware receiver had the right and, indeed, the duty to talk to counsel for the Fox Theatres about a proposed settlement. That Manton may have known someone who knew Kent, which is highly likely, is utterly irrelevant in the absence of other facts. All this amounts to is an attempt at sly innuendo without any foundation in fact whatsoever.

The allegation is also made that 'the business and personal relationships between said Manton and certain persons, firms or corporations (or their respective servants, agents or employees) interested in (the plenary) action by Sherman and Atkinson, as receivers, as against Fox Film Corporation, et al., were not disclosed by said Manton' to the Fox Theatres creditors 'as they should have been.' Nowhere is the nature of these relationships stated. The persons with whom they were maintained are not identified. No facts are alleged to show that bearing, if any, they have upon anything which occurred in the Fox Theatres receivership. These allegations are wholly insufficient to show that there was anything which should have been disclosed to the creditors, much less that Manton was disqualified from passing on the settlement. See Morse v. Lewis, 4 Cir., 54 F.2d 1027; In re Fox West Coast Theatres, 9 Cir., 88 F.2d 212, certiorari denied sub nom. Talley v. Fox Film Corp., 301 U.S. 710, 57 S.Ct. 944, 81 L.Ed. 1363; Duncan v. United States, 9 Cir., 48 F.2d 128, certiorari denied 283 U.S. 863, 51 S.Ct. 656, 75 L.Ed. 1468; In re Nevitt, 8 Cir., 117 F. 448. See, also, Wierin v. Shubert Theatre Corp., 2 Cir., decided May 13, 1942, rehearing denied November 14, 1945, unreported.

***35** (4)

With this slim background, totally devoid of any facts spelling out fraud and corruption of any of the officers of the court who are involved in the receivership, we come to the signing of the order of November 17, 1933 by Manton. The allegations are made (1) that no proper notice of the settlement was given to the Fox creditors, and (2) the settlement was 'patently, grossly, completely, wholly and unconscionably inadequate and insufficient'.

I have already referred to the facts concerning the

procedure as to notice and hearing on the proposed settlement (see supra at page 25 of 182 F.Supp.) and I will not repeat them. It is admitted that notice was given to all parties and intervenors in the receivership action and that one of the creditors did appear at the hearing.

Under the then Equity Rule IV of this court all matters were to be heard 'upon such notice to the parties and creditors as (the judge) shall prescribe'. There was no requirement that notice be given to all creditors of an application for approval of a settlement made by the receivers. The notice given in this instance was the same as that given on all of the numerous applications for settlement made throughout the course of the receivership until the transfer of assets to the trustees in 1939.

It might even be argued with some plausibility that this was an administrative matter (see Petition of Baxter, 6 Cir., 269 F. 344) which under Rule IV could be disposed of ex parte.

But even if the notice given was inadequate the important fact is that there was no attempt to conceal the settlement from the creditors or to brush it under the rug. On the contrary it was referred to at length in the fee applications of the receivers and their counsel filed less than three weeks after the order of approval. It was brought specifically to the attention of all creditors in the receivers' semi-annual report filed less than seven weeks after it was consummated and in numerous later reports and applications in the course of the receivership.

It may be noted, moreover, that the settlement was also approved by the Delaware Chancery Court upon application of the receiver of General Theatres after full notice served on creditors and published in New York and other newspapers.

There is nothing to support the petitioners' conclusions that the creditors were not notified in order to conceal the terms of the settlement. Nor is there anything alleged showing that the order of November 17, 1933 was void per se even if that question could be raised at this stage of the proceedings in the absence of fraud and corruption.

The characterizations as to the inadequacy of the settlement are mere conclusions of the petitioners. The petitioners apparently are under the misapprehension that the more adjectives they use to characterize the settlement the stronger become their allegations. No facts have been alleged to support such conclusions.

There is no showing as to the value of what the various parties to the settlement received or gave up under it. The terms are not even stated.

Yet the records of this court show that the receivers obtained for the estate in the settlement some $830,000 and the release of claims aggregating almost $4,000,000. The difficulties of litigating the matters in controversy were plainly enormous. Such difficulties, like attendant expense, inconvenience, delay and uncertainty of success, are, of course, major factors in settlement. Moreover, it must be remembered that the settlement was made in the depths of the depression and no doubt was affected by the economic conditions then prevailing.

Such facts as appear in the court records belie the petitioners' mere conclusions that the settlement was inadequate. No factual basis has been shown to indicate that it was inadequate at all, to say nothing of its being so inadequate overall as to shock the conscience of the court and justify setting it aside. See ***36** Gelfert v. National City Bank, 313 U.S. 221, 61 S.Ct. 898, 85 L.Ed. 1299; Graffam v. Burgess, 117 U.S. 180, 6 S.Ct. 686, 29 L.Ed. 839; In re Burr Mfg. & Supply Co., 2 Cir., 217 F. 16; Bethlehem Steel Co. v. International Combustion Engineering Corp., 2 Cir., 66 F.2d 409; In re Riggi Bros. Co., Inc., 2 Cir., 42 F.2d 174; In re Paley, D.C.S.D.N.Y., 26 F.Supp. 952. No facts are alleged to show or lead to the conclusion that the settlement resulted from fraud and corruption on the part of the officers of the court who participated in it.

(5)

Petitioners urge that regardless of whether any of their separate allegations concerning the acts of Manton and the receivers state facts showing corrupt conduct,

'They must be viewed as part and parcel of the conspiracy of respondents achieving its purpose to dissipate Fox Theatres property rights through the complicity and connivance of Judge Manton. That Judge Manton could legally—if with proper motives— have done or omitted to do one or more though obviously not all of these acts * * * is beside the point if it be assumed in accorddance with Petitioners' allegations that Judge Manton's acts were corrupt, and that the very acts which he could have lawfully done— had he acted in good faith and in performance of his duty— became defiled by the circumstance that he lent himself and his high office to the object of accomplishing Respondents' nefarious purposes.' (Italics supplied

The difficulty with petitioners' position is that it is based on the assumption that their allegations show that Judge Manton's acts were corrupt. If that assumption were correct petitioners might have smoother sailing. But their allegations do not state any facts making such a showing. Assuming that a conspiracy of the nature alleged existed,

there are no allegations of fact showing, or from which it can be concluded, that Manton became a part of it, or, in petitioners' words, 'lent himself and his high Office to the object of accomplishing Respondents' nefarious purposes'.

The petitioners' characterizations, conclusions and innuendos are not a substitute for absent allegations of fact. Such allegations, for example, as that acts were done 'as a result of frauds and fraudulent practices and conspiracies perpetrated and entered into' by respondents, add nothing in the absence of facts from which it could be concluded that this is what occurred.

The Authorities on Which Petitioners Rely

In United States ex rel. Accardi v. Shaughnessy, 2 Cir., 206 F.2d 897, 904, Judge Frank pointed out in the course of his dissenting opinion:

'An attack on an official's decision, by recourse to off-the-record evidence, is not allowed if the allegations are vague: Legality should be more than well-ordered paper work, but allowable peering behind the paper facade has its limits. One may not compel an official to submit to court room interrogation in the search for possible concealed, unlawful behavior, unless one first brings forward some striking traces of it. As a consequence, well-concealed misconduct may escape judicial correction. That is the price we pay to avoid having governmental action at the mercy of everyone who voices mere suspicions. For instance, to open up the judgment in the Root Refining case (Root Refining Co. v. Universal Oil Products Co., 3 Cir., 169 F.2d 514) it would not have sufficed to allege, without more, 'the judge was bribed'. There must be an offer to prove specific facts which will pretty plainly impugn the official record.'

See, also, Judge Frank concurring in United States v. Scully, 2 Cir., 225 F.2d 113, at page 117.

Petitioners place their main reliance on ***37** Root Refining Co. v. Universal Oil Products Co., 3 Cir., 169 F.2d 514, certiorari denied sub nom. Universal Oil Products Co. v. William Whitman co., 335 U.S. 912, 69 S.Ct. 481, 93 L.Ed. 444, to which Judge Frank referred. However, rather than supporting their position here the case points up its deficiencies.

In the case at bar there has been no offer to prove 'specific facts which will pretty plainly impugn the official record' nor, indeed, have petitioners 'brought forward some striking traces' of unlawful behavior on the part of officers of the court. It is not even alleged that 'the judge was bribed'. All that is alleged are conclusions that conduct otherwise lawful was corrupt.

In contrast, in the Root case there were allegations of specific facts showing beyond question a judge had been corrupted and had rendered a corrupt decision.

In the Root case the Court of Appeals of the Third Circuit instituted proceedings on its own motion to reopen one of its judgments because of a corrupt conspiracy between Judge Davis, one of its judges, and Kaufman, an attorney employed by Universal, one of the litigants. Davis and Kaufman had been indicted in 1940 for obstruction of justice. Upon the trial of the indictment the jury disagreed.

At the instance of parties affected by the judgment on appeal, who asserted that the evidence at the criminal trial indicated that Judge Davis had been bribed, the court in November 1941 appointed a special master to investigate the charges.

After taking extensive evidence the special master reported that the judgment on appeal had been obtained through the corruption of Judge Davis by Kaufman. The Court of Appeals approved the findings of its special master and vacated the judgment.

The Supreme Court reversed (Universal Oil Products v. Root, 328 U.S. 575, 578, 66 S.Ct. 1176, 90 L.Ed. 1447) on the ground that there had not been a proper adversary proceeding. The Court of Appeals then vacated its order setting aside the judgment on appeal but on its own motion ordered Universal, who had employed Kaufman, to show cause why the judgment should not be vacated because of fraud upon the court. It authorized the Attorney General of the United States to appear as amicus curiae.

The Attorney General as amicus filed a 'Statement of Ultimate Facts' supporting the charges of fraud which would 'operate as a pleading under the Rules of Civil Procedure'. That statement set forth the following facts:

There was an arrangement between Kaufman representing Universal and Judge Davis whereby Davis was to perform judicial favors for Universal in return for financial benefits out of monies paid to Kaufman by Universal. The benefits were by way of a $10,000 loan from Kaufman to Stokely, a relative of Davis, which was not a bona fide business transaction. Kaufman obtained the $10,000 loaned to Stokely from $25,000 paid to him by Universal the day after certiorari had been denied by the Supreme Court in the cases which Davis had decided in its favor.

Kaufman performed no legal services of any value in the cases and was retained and paid solely because he was an intimate of Davis. Davis decided the cases in favor of Universal in return for the financial benefit received from Kaufman. Davis and Kaufman had a continuing corrupt relationship during this period by which Davis, in return for financial benefits from Kaufman, was to favor Kaufman's clients, one instance of which was a bribe paid to Davis by William Fox in return for which Davis had decided bankruptcy matters before him entirely in favor of Fox.

The Attorney General followed this statement with a document entitled 'Notice of Issue and Proofs in Support' thereof which set forth the evidence on which he relied to show the corruption of Davis by Kaufman resulting in the decisions in favor of Kaufman's client Universal. This document went into the details of the facts set forth in the previous ***38** 'Statement of Ultimate Facts' and elaborated on them. For example, it gave the dates, places and circumstances of the meetings between Davis and Kaufman, the circumstances under which Kaufman was retained for the sole purpose of influencing Davis, the details of the checks received by Kaufman from Universal and the deposit of them in his bank account, the delivery of Kaufman's checks on this account to Stokely by Davis's law clerk, the payment by Stokely to Davis of $1,400 for his own use, the payment of $27,500 to Davis by Fox at the instance of Kaufman, and the decision of five bankruptcy appeals in Fox's favor on opinions written by Davis in consideration for the bribes received.

There is no question that specific facts were alleged showing the corruption of Judge Davis and a fraud upon the court. Respondent Universal never raised such a question. Universal's motions were directed to a dismissal of the entire proceeding on the ground there was no justiciable controversy under the Constitution and were denied.

The Court of Appeals ordered that a hearing be held to determine whether Davis's judicial acts had been corruptly influenced by Kaufman. Its order was based upon the allegations of specific wrongdoing set forth by the Attorney General, and specific findings by the special master that Davis and Kaufman had been guilty of fraudulent and corrupt conduct, which the court had previously adopted.

After a hearing before the Court of Appeals, without the intervention of a special master, the court found, in detail, that Davis had been corruptly influenced by Kaufman to decide in favor of Universal, and that Davis had also been bribed in the Fox matters. It ordered that the judgment which had previously been entered in favor of Universal should therefore be vacated and Universal's suits dismissed.

[12] There is no doubt that the Root case stands squarely for the proposition that a court has the inherent power to inquire into the integrity of its own judgments and to set them aside when fraud or corruption of its officers has been shown. But it does not hold directly or by implication that the court should permit an adversary proceeding of the nature of the one at bar to proceed in the absence of facts showing that such fraud or corruption existed.

The other cases on which petitioners place reliance, Hazel-Atlas Co. v. Hartford Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250; Dick v. Marr, D.C.S.D.N.Y., unreported, Equity No. 50-59, and the Academy of Music proceeding in this equity receivership do not hold so either.

In the Hazel-Atlas case the Supreme Court found that the proof of fraud was 'conclusive'.

In Dick v. Marr, an elaborate petition filed by the Government as amicus curiae charged that plaintiff had perpetrated a fraud on the court by suppressing evidence. Evidence of the fraud had come to light as a result of an indictment filed against plaintiff. The sufficiency of the petition was never attacked though, after hearing, the court found that fraud had not been established.

The original Academy of Music petition was dismissed though it annexed a copy of an indictment charging a conspiracy to bribe Judge Manton to bring about the sale which was sought to be set aside. The amended petition specifically charged that a bribe in the amount of $20,000 had been paid to Manton by check of Skouras, one of the conspirators, and delivered to him by Newins, another of them. Thus petitioners in the Academy of Music matter were required to and did allege specific facts showing corruption— allegations which are lacking in the petition at bar.

The proceeding conclusion at bar, quite unlike that in the Root case is not a proceeding instituted by the court on its own motion after a showing of facts constituting corruption. The burden here is on the petitioners as private litigants to allege facts showing corruption or from which it can be concluded that corruption existed with relation to the order they seek to set aside.

***39** The court has given petitioners and counsel for the Trust Company of Georgia, as creditor, ample opportunity to elicit such facts if they exist. Their inquiry before the special master appointed by the court has been pursued

for some ten years. It followed an extensive previous investigation by the United States Attorney. Yet petitioners have failed to present any facts in this petition to sustain the charges which they assert.

I will pass over the contention made by the moving respondents, not without some merit, that apart from the failure to show corruption of Manton the petition also fails to allege facts showing their connection with any such fraud or corruption if it had been shown to exist. Nor will I deal with the respondents' contention that the petition is fatally defective in failing to allege affirmatively when the alleged corruption was discovered, and facts showing that it could not have been discovered earlier by the exercise of due diligence, or with the contention that these petitioners have no standing to maintain this summary proceeding. It is unnecessary at this time to pass on these contentions, or on the question of whether, as a matter of law, laches may be raised as a defense.

[13] I hold that the petition is fatally defective in any event for the reason that, accepting its allegations of fact as true, it fails to state facts showing, or from which it can be concluded, that the order of November 17, 1933 was the result of fraud or corruption on the part of officers of the court.

This would ordinarily call for a dismissal of the petition. Moreover, after all that has gone on and all the opportunity which has been afforded petitioners to obtain and present any facts which may exist, to permit the filing of an amended petition would only serve to prolong further litigation on claims which have grown increasingly stale. To do so would not be in accord either with public policy dictating an eventual end to litigation or with sound judicial administration.

[14] However, this is not an ordinary case. Serious charges have been leveled against the integrity of the court itself. There have been protracted hearings at which thousands of pages of testimony have been taken. Manton, against whom these grave charges are made, stands convicted of dishonest judicial conduct in another connection. There is evidence lending support to the claim that in a later phase of this same receivership Judge Manton was corruptly influenced and that Newins and Skouras Theatres, who are named in the present petition, were participants in such corruption. Charges of improper conduct made against the receivers resulted in substantial settlements with them or their sureties. Quite apart from whether any of these facts bear on the present claims, the whole atmosphere surrounding the receivership is unsavory.

All this requires that the court make sure that it has not overlooked any actual evidence of fraud or corruption, if any such evidence exists. I have therefore determined that I will not dismiss the proceeding finally at this time. Instead, adopting a procedure somewhat analogous to that used in the Root case, I will direct that petitioners file with the court a detailed statement of any actual proof which they have showing that the order of November 17, 1933 was brought about by the corruption of Judge Manton. By now such proof, if it exists, must be in the form of testimony or documentary evidence. The statement so to be filed will be accompanied by the excerpts of the testimony and the documentary evidence on which petitioners rely.

The statement will be limited to the specific charge I have just mentioned. It will consist of facts only and will not contain any characterizations, conclusions or innuendos of the petitioners or their counsel. The court will evaluate such evidence as may be presented and will draw its own conclusions.

If it appears from the statement that there is sufficient evidence that the order of November 17, 1933 was the result ***40** of corruption of Judge Manton to justify the maintenance of this summary proceeding, or any action on the court's own motion, then the court will consider and fix procedures for the future conduct of such proceedings as may be appropriate. If, on the other hand, the statement fails to present such evidence the petition will be dismissed and this long drawn out matter will be finally laid at rest.

The statement to be filed by petitioners will be served on the moving respondents who will have opportunity to comment thereon. The times within which petitioners' statement and respondents' comments will be served and filed will be fixed in the order to be entered on these motions which will be settled before me on ten days' notice. When proposed orders have been filed I may, if I deem it necessary, afford the parties an opportunity to be heard with respect to provisions of the order to be signed. Parties will be notified if and when they will be heard in that connection.

All Citations

182 F.Supp. 18, 3 Fed.R.Serv.2d 98

Footnotes

1 On August 16, 1932 Alfred Blumenthal, a creditor of Fox Theatres who is named as a respondent and co-conspirator in the proceeding at bar, moved to vacate the order of June 22, 1932 appointing the temporary receivers, and all orders entered thereafter, on the ground that the proceedings were 'collusive, sham, fictitious, in bad faith and of ulterior motive'. He alleged a collusive and fraudulent scheme to milk Fox Theatres of its assets, to place it in friendly equity receivership, and to have Atkinson appointed as receiver for the purpose of prejudicing and defrauding its creditors. The motion was denied by Judge Manton.

2 Most of these same charges were litigated in an action brought in 1932 in the Supreme Court, New York County, by Chicago Title & Trust Company against William Fox. Fox impleaded as additional defendants Fox Film Corporation, Fox Theatres, Chase Bank, Chase Securities Corporation, General Theatres Equipment and Hastings, as its receiver, among others, charging conspiracy to strip Fox Theatres of its assets and force it into a friendly receivership in order to defraud its creditors, of whom Fox was one. After a lengthy trial the late Sol M. Stroock, a distinguished member of the New York Bar, acting as referee, found in a 118 page opinion rendered in 1936, that no such conspiracy existed and that there was no merit to the charges. In the course of his opinion he carefully reviewed many of the transactions which the instant petition charges were part of the respondents' conspiracy. Chicago Title & Trust Co. v. Fox., N.Y.Sup.Ct., Index No. 31588 (1932), judgment entered June 2, 1936, app. dism. (1st Dept.) N.Y.L.J. December 18, 1936, p. 2288, not officially reported.

3 I have already held in Chicago Title & Trust Co. v. Fox Theatres Corporation (Steinreich v. Sterling Bank and Trust Co.), D.C., 178 F.Supp. 899, that this court has no jurisdiction to entertain summary proceedings brought by the trustees of the Fox realization trust in the equity receivership to enforce rights which do not arise from alleged corruption of officers of the court in the course of the receivership.

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